91-856
(1)

No.: _____

IN THE

Supreme Court of the United States

October Term, 1991

GENE GOTTI and JOHN CARNEGLIA,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RONALD P. FISCHETTI
Attorney for Petitioner
Gene Gotti
757 Third Avenue
New York, New York 10017
(212) 593-7100

GERALD L. SHARGEL
Attorney for Petitioner
John Carneglia
150 East 58th Street
New York, New York 10155
(212) 486-1717

QUESTIONS PRESENTED

1. Whether petitioners' due process rights were violated by the district court's

> a. exertion of undue pressure on the lone juror holding out for acquittal;
>
> b. excusal of the holdout juror based on his subsequent claim that he was fearful because of an incident which allegedly had taken place outside the courtroom;
>
> c. denial of petitioners' motion for a mistrial after it was learned that the holdout juror had told the other jurors of the incident during deliberations; and
>
> d. refusal to ask the eleven remaining jurors, prior to their resumption of deliberations, whether they would be affected by what they had learned from the dismissed juror.

2. Whether the testimony of the government's "drug expert" exceeded the bounds for expert testimony underlying Rule 702 of the Federal Rules of Evidence?

3. Whether the Court of Appeals erred in ruling that petitioners, even though they were the named targets of an order authorizing electronic surveillance, lacked standing to challenge a violation of that order because it had authorized surveillance only of an alleged co-conspirator's home?

LIST OF PARTIES

Petitioners Gene Gotti and John Carneglia were defendants-appellants below. The United States of America was plaintiff-appellee. Petitioners Gotti and Carneglia are filing a joint petition for a writ of certiorari.

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Petitioners Gene Gotti and John Carneglia respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgments of conviction entered in the United States District Court for the Eastern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the appendix at pp. 1a-48a. The District Court's findings of fact appear in the appendix at pp. 51a to 68a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 22, 1991, (1a); rehearing was denied on May 14, 1991, (49a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Because of their length, the pertinent constitutional and statutory provisions and rules appear in the appendix at p. 69a.

STATEMENT OF THE CASE

The original indictment was filed on September 21, 1983, charging petitioners Gotti and Carneglia, and eleven others, with narcotics, racketeering and other federal offenses. This petition relates to the third trial of the indictment. On May 23, 1989, the jury at the third trial found Gotti and Carneglia guilty of racketeering conspiracy, narcotics conspiracy, and possession of heroin with intent to distribute. Carneglia was also found guilty of violating the Travel Act, 21 U.S.C. §1952. On July 7, 1989, Gotti and Carneglia were sentenced to consecutive terms of imprisonment totaling fifty years, special parole terms of three years and fines of $75,000.

A. Procedural History

On August 23, 1983, petitioners were arrested on a complaint charging racketeering and narcotics offenses. The arrest was the direct result of an eight-month electronic surveillance of the home of co-defendant Angelo Ruggiero, then the principal target of the government's investigation.[1] Over the next six years, Gotti and Carneglia were nearly anchored to a courtroom defending those charges.

The first trial began on April 27, 1987 with ten defendants. After nine months of trial, District Judge Mark Costantino declared a mistrial based on a "possibility" of jury tampering. The defendants contended that the trial was going in their favor

1. Shortly before the third trial began, the district court found that, for health reasons, Ruggiero was unfit to stand trial. He died on December 5, 1989.

and that there was no basis for the tampering allegation.[2] Petitioners pressed a double jeopardy claim seeking to bar retrial, taking an interlocutory appeal to the Second Circuit. The government won permission to retry the case over Judge Lumbard's dissent. *United States v. Ruggiero,* 846 F.2d 117 (2d Cir.), *cert. denied,* 109 S. Ct. 491 (1988).

After reassignment, District Judge Joseph M. McLaughlin ordered a severance, directing that Ruggiero, Gotti and Carneglia proceed to trial separately. The second trial began on May 9, 1988. After four months of testimony, the jury was unable to reach unanimous agreement on any count or defendant, resulting in a second mistrial.

On its third attempt to convict these defendants, this time before District Judge John R. Bartels, the government finally was successful. Fundamentally, this appeal challenges the integrity of that verdict. Petitioners mount this challenge with the hope that this Court will weigh their claims without regard to the nature of the charges of which they stand convicted. As Judge Lumbard observed in his dissent on the double jeopardy appeal:

> However heinous the crimes of which the defendants stand accused, and however despicable their reputations, they are no less entitled to the protection of the Constitution. ... 846 F.2d at 129.

B. Agent Franciosa's "Expert" Testimony

The central issue at trial was the reliability and meaning of taped conversations (the "tapes") offered by the government as the result of the electronic surveillance of the Ruggiero home.

Gerald Franciosa, an agent with the Drug Enforcement Administration, was called by the government as an expert witness to explain, *inter alia,* the purported significance of the tapes. The government put its entire case together through

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2. As time proved, the allegation of jury tampering was baseless. Criminal charges brought against an individual unknown to the defendants, alleging that he had tampered with a juror *after* the juror had been discharged, resulted in acquittal. Despite an intense grand jury investigation, no charge was ever brought that a sitting juror had been approached.

Franciosa. Franciosa's testimony was the subject of fierce and frequent objection by defense counsel, who argued that he was improperly drawing inferences for the jury and arguing in a manner reserved for summation. Franciosa's testimony typically proceeded with the government playing portions of the tapes and then asking Franciosa for his interpretation of the conversations. Those conversations, with Franciosa's gloss, revealed what the government alleged was criminal activity. In the final analysis it was Franciosa's interpretation of the tapes that supplied the government's proof of the crimes charged.

C. Petitioners' Standing To Challenge The Admissibility Of The Tapes

Petitioners argued that pervasive live monitoring of the electronic interceptions within Ruggiero's home violated (i) the specific limitations of the order which had authorized the interceptions, and (ii) the statutorily mandated minimization requirement. The district court rejected those contentions. On appeal, the Second Circuit limited its analysis to the issue whether petitioners had standing to assert that a minimization violation had been established. The court of appeals held that petitioners lacked standing because they "had no expectation of privacy in Ruggiero's home and telephone" (39a) and, therefore, were not "aggrieved person[s]" within the meaning of 18 U.S.C. §2518(10)(a). Consequently, aside from stating that it saw no basis to overturn the district court's ruling, the court of appeals failed to analyze the merits of petitioners' contentions.

D. Jury Deliberations[3]

On May 17, 1989, jury deliberations began. On May 22, after five days of deliberations had passed uneventfully, the court received the following note:

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3. A summary of the events that took place during deliberations also appears in Judge Bartels' "Findings of Fact" which was issued on May 27, 1989, a few days after the trial had ended. The "Findings of Fact" are set forth in Appendix C at 51a to 68a.

> One Juror refuses to vote, are there any guidelines to help us.[4]

Judge Bartels announced that he would give the jury a "modified *Allen* charge," but flatly refused to apprise counsel of what he would say. After hearing the "modified *Allen* charge," defense counsel immediately objected, arguing that, contrary to what the jurors had been told, they were not under an absolute, sworn obligation to render a verdict, but could fail to agree.

Later the same day, the court received a second jury note, stating:

> While attempting to reach a decision concerning the innocence or guilt of the defendants, a juror refuses to discuss the case at all.

Rather than instructing the jurors to exchange views and consult with one another, the judge announced that he would question the "holdout" juror individually. Even at this juncture, Judge Bartels was looking toward the ultimate excusal of the juror as he proposed asking the juror why he refused to discuss the case and "if it's instigated by sympathy or any other reason." The defense objected, arguing that such questioning was a direct "intrusion into the deliberative process" and that, after six days, the juror simply may have reached the point where he was not convinced beyond a reasonable doubt and, therefore, was "not discussing it any further."

Judge Bartels adhered to his decision to question the juror individually and even stated that, if the juror indicated that he had reached his "final decision," the court intended to determine "if there is any fear or sympathy that he has in mind, that

4. We have set out this and the other jury notes verbatim, without correcting errors of punctuation, spelling or grammar.

prevents him from discussing the case."[5] The defense renewed its objection, and the court noted that it was considering whether to excuse the juror.

At that point, juror #9 entered the robing room for the first of what turned out to be five individual colloquies with the judge. The judge asked the juror for "a reason" for his failure to discuss the case, but the juror indicated that he had discussed the case and that he had voted his conscience. The juror stated: "I may not have discussed the case like some of the jurors have discussed the case in length, but I discuss it in my own way with them. I have been cooperative." The juror also said that the vote slips were in the jury room, and that the judge could "see the ballots." Judge Bartels responded "I need another note from the foreman of the jury telling me what there [their] vote is," and excused the juror.

During this colloquy, juror #9 did not refer to "fear" or to an encounter with strangers near his home. It was already clear, however, that he was at loggerheads with the other jurors, and that there was a factual dispute as to his willingness to discuss the case further. It was also clear from the colloquy that the court had already pressured juror #9 by causing the jurors to conduct a formal vote and that the juror would feel even more pressure now that the judge had told him that he needed to know what the vote was. Because juror #9 had been singled out for individual colloquy, the defense again moved for a mistrial.

At that point, without any further communication from the jury, Judge Bartels decided to give another *Allen* charge. He overruled defense objections that a second *Allen* charge, coming immediately after juror #9 had been singled out by the other jurors and by the court, would be inappropriate. After the second *Allen* charge had been given, the judge received another jury note stating that one juror wanted to have a private conference with the court. Judge Bartels told the jurors that there could be no private conference, but that any juror could

5. Judge Bartels' speculative reference to "fear" was particularly telling because, at that point, there had not been any indication in a note or otherwise that any juror had been compromised or had felt afraid. The judge made that comment, it would seem, only because of the climate in which the trial had been conducted.

write a note and ask a question. The following note emerged from the jury room:

> Att Judge Bartels:
> There are two point I would like to address to you. No. (1) there were talk in the juror room concerning the fact that I could (go) to jail. And what would happen to my family left behind. Tollerence and patience is not prevailing in the juror room. No (2) I strongly feel that my residence is known, and is very concerned for my family. I simply can't be persuated or forced to vote against my belief and conscience.
>
> Yours Truly
> Juror # 9

Rather than declaring a mistrial at that point, Judge Bartels remained interested in knowing whether juror #9 had in fact voted. Defense counsel argued that the judge had just asked the juror if he had voted, and that the juror had stated that he had, even offering for the judge to check the ballots. Judge Bartels responded "We're going to do it again." The government asserted that juror #9 had "deliberately lied to the court" "about voting and deliberating." Noting "how heated deliberations can be," the government argued that juror #9 should be excused and that his concern that his address had become known was simply "an excuse" because he "does not want to continue deliberating."

Judge Bartels, continuing to focus on whether juror #9 had voted, brought the juror back to chambers for another colloquy. Juror #9 repeated that everyone, including himself, had voted. The juror then left, and the clerk reminded the judge that he had not told the juror that his residence was not known to anyone. The court summoned the juror once more, and the following colloquy took place:

> THE COURT: Bring him in. Juror number nine, I wish to tell you as far as we know no one knows your residence. You can go back and feel free on that.

JUROR: Am I dismissed, your Honor?

THE COURT: Yes.

JUROR: Thank you.

There was no suggestion in this exchange that there had been any incident at the juror's house or that he had any specific basis for believing that his address had become known. The juror said nothing to elaborate on his concern, and the government repeated its claim that he was "looking for a way out and doesn't want to continue deliberating."

Defense counsel again moved for a mistrial, citing the judge's two previous instructions to the jury, the individual conferences with juror #9, and the most recent note indicating that deliberations had broken down and that juror #9 was refusing to be "forced" into abandoning the vote of his conscience. Counsel argued that, given all that had occurred, further proceedings would be unduly coercive.

Incredibly, Judge Bartels continued to focus on whether juror #9 had voted. Over objection, he decided to call the entire jury back to the courtroom to ask once more whether everyone had voted. Once again he was told, this time by the jury foreman, that everyone had. The jury was excused for the evening, and defense counsel renewed their motion for a mistrial, arguing that the pressure on juror #9 had to be unbearable and that any subsequent verdict would be coerced.

The next morning, the court received the following note:

> Over the course of the last seven days of deliberations, the jury has reached an informal, unanimous agreement as to the guilt of the defendants on the 4 counts involved in the indictment. However, due to the fears of one juror relating to alleged threats he received prior to deliberations, the jury is unable to reach a formal unanimous verdict on any of the 4 counts. It is the conclusion of the jury that this situation cannot and will not be resolved.

The defense again moved for a mistrial, arguing that some of the jurors were resorting to coercive tactics and that further individual inquiry of juror #9 would be unduly coercive. Judge Bartels brought juror #9 into chambers for yet another individual colloquy. During that colloquy, the judge asked about "threats," and the juror replied "[i]t wasn't threats in the nature of a threat itself" and then described an incident that allegedly had occurred a full week earlier before jury deliberations had begun. The juror claimed that two men had approached him in his driveway and that one had said to him "you are on the Gene Gotti jury trial or something like that." The juror said that, when he did not reply, the men "immediately turned around and left."

Judge Bartels asked juror #9 if he was scared, and he replied that he was "concerned." The juror stated that the incident had not scared him "right away," or "I would have made it known that I wanted to see you. It didn't bother me at that point. It really didn't." However, he stated that, some four days later, "it began to dawn on me as to why where those particular individuals in my driveway." The juror said that he had told some other jurors the evening before, in the men's room, that there was something bothering him. He first told them that he had some kind of "dream" or "premonition," without disclosing the incident involving the two men. However, he stated that that morning he had begun to cry during deliberations and told his fellow jurors of the incident. Juror #9 stated that, after the other jurors learned of the incident, they told him that the judge "may be able to warrant some fence as far as a shield around your area."

Thereafter, Judge Bartels asked juror #9 several leading questions to try to elicit that fear had influenced his vote. In response, the juror stated that he felt fear because of the incident, but that fear was "not completely" what was motivating his vote. The juror stated that he also had doubts about the validity of the charges against the defendants. At no point during that interview did Judge Bartels ask the juror if his vote would have been the same putting the alleged incident to one side, or if he could vote based solely on the evidence that he had heard.

After the interview, defense counsel raised the possibility that the juror's account of the incident might be only "an excuse to avoid an unpleasant duty and to get off the jury." Defense counsel again moved for a mistrial, observing that, regardless of whether the incident had been an attempt at juror intimidation, it had now been communicated to all of the other jurors, leaving them "hopelessly polluted." Defense counsel observed that the court had *not* admonished juror #9 not to discuss his fears with the others, who in any event were now aware of the situation. The government moved for the excusal of juror #9 pursuant to Fed.R.Crim.P. 23(b).

After observing that there was no indication that the men who allegedly had approached juror #9 were related to the defendants, Judge Bartels stated that he was concerned with the juror's equivocation, noting the juror's "statement that he made that his voting was partially from fear, but partially from the evidence." The judge also noted that the juror's reference to fear was a belated one: "He said it today. But before he didn't say that."

Defense counsel, relying on *United States v. Aiello,* 771 F.2d 621 (2d Cir. 1985), observed that, despite the juror's expression of fear, it might be possible for him to set aside his fear and continue to deliberate.[6] Judge Bartels decided to call juror #9 back into chambers for yet another individual colloquy, the fifth in two days. The colloquy focused on the juror's state of mind at various points during deliberations. The judge stated that he was "bothered by" the difference between the juror's statements of that morning and his statement of the previous day. The juror repeated that he had been told in the jury room that he could go to jail if he persisted in his vote:

> THE JUROR: It was the jurors. We were discussing the case and they -- several of them stated, they called me by name and not by number. Do you understand the ramifications that you could go

6. Counsel made that point while explicitly preserving the pending motion for a mistrial. The court specifically assured counsel that the mistrial motion had not been withdrawn.

> to jail and then what would be your concern to your family.

Judge Bartels asked a second series of leading questions focusing on the incident and on the juror's "fear." Although the juror stated that his vote "in part" had been motivated by fear, he also stated that he was being coerced by the other jurors.

The judge told juror #9 that the matter could not be left "up in the sky" or "cloudy." The juror commented "it hasn't been easy, each time I come in here and go back to the jury room." The judge replied that he had "to settle this one way or the other" and again referred to the conflict between the juror's note of the day before and his statements that morning. The juror reiterated that the note had not been prompted by fear, but rather by the other jurors' references to a grand jury investigation and to his possible imprisonment if he voted for acquittal. Juror #9 stated "That was like jamming something down my throat if I didn't go a certain way." Judge Bartels responded by asking a third set of leading questions which suggested and elicited that the juror had, in part, been motivated by fear.

After the interview, Judge Bartels ruled that juror #9 would be excused and that deliberations would proceed with eleven jurors. Defense counsel again moved for a mistrial, arguing that it was clear from juror #9's statements that he had discussed the "alleged implied threat" with the other jurors and that it "ha[d] already infected the jury." The judge stated that he would ask the remaining jurors "whether they can render a fair and impartial verdict under the circumstances that arise from the dismissal of juror number nine."

When the jury returned to the courtroom, Judge Bartels announced that juror #9 had been dismissed and that his dismissal should not affect their further deliberations. However, he did not question the other jurors, individually or as a group, about their ability to return a fair and impartial verdict. Instead, he instructed them to go back to the jury room and carefully reexamine all of the evidence so that they could reach a verdict "one way or the other, without bias or sympathy and without considering the dismissal of juror number nine."

Defense counsel requested that the judge specifically instruct the jurors that they should ignore any information that they had received from juror #9, because that was not evidence. The court rejected that instruction as unnecessary. Counsel reminded Judge Bartels that he had stated that he would poll the remaining jurors to determine if they could still be impartial. The judge acknowledged that such an inquiry was "perfectly proper" and that he had promised to make one. The government, however, objected to such an inquiry. Defense counsel responded:

> MR. FISCHETTI: Before this jury goes out and deliberates, I think in all fairness, with what we know went on in that jury room for two days, it's a very very simple question to ask them, and I really don't know what the government is objecting to, if you would ask them as you said you would, in light of all what happened in the last two days could you still render an impartial verdict.

The judge adhered to his refusal to ask the question.

A short time after juror #9 had been excused, the remaining jurors reported that they had reached a verdict, but Judge Bartels refused to accept it. Instead, he told the jurors that they had not had enough time to deliberate independently and asked them to review the evidence again and "lay aside anything that you might have heard from juror #9." Defense counsel again renewed their motion for a mistrial, which was denied. A few hours later, the remaining jurors again reported that they had reached a verdict. This time the court accepted the verdict, which found petitioners guilty on all charges. After polling the jury, Judge Bartels congratulated each juror for their "outstanding devotion" to their "important work" and for their "good service." He also expressed his "gratitude and thanks."

At that point, after the jurors had been congratulated and thanked, the government reconsidered its earlier position and suggested that the jurors be polled on three questions: (i) whether their verdict had been based solely upon the evidence;

(ii) whether they had been affected by anything that juror #9 had said during deliberations; and (iii) whether their verdict had been affected by the dismissal of juror #9. Defense counsel argued that those questions were a belated attempt to correct the record, and that it was "an exercise in sophistry to think that the jury already convicted and polled is going to answer any of these questions in the affirmative." Judge Bartels acceded to the government's request, and the jurors, in response to those questions, gave answers supporting the verdict for which they had just been congratulated and thanked.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DISTRICT COURT'S HANDLING OF THE VERY UNUSUAL EVENTS THAT OCCURRED DURING JURY DELIBERATIONS VIOLATED PETITIONERS' DUE PROCESS RIGHT TO A FAIR TRIAL.

The Fifth Amendment commands that "[n]o person shall ... be deprived of ... liberty without due process of law." As this Court has recognized:

> No general respect for, nor adherence to, the law as a whole can be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.

Coppedge v. United States, 369 U.S. 438, 449 (1962). While "'[t]here is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers,'" especially "where the conviction is for a narcotics violation at a time when the country is engaged in a 'war on drugs,'" "a courtroom is not the proper place in which to fight such a 'war.'

A defendant charged with a narcotics violation is presumed like every other defendant to be innocent until proven guilty beyond a reasonable doubt after a fair trial." *United States v. Edwardo-Franco,* 885 F.2d 1002 (2d Cir. 1989), *quoting Krulewitch v. United States,* 336 U.S. 440, 457 (1949) (Jackson, J., concurring).

Petitioners do not question the seriousness of the drug problem plaguing this country; nor do they suggest that they are entitled to special privileges because of the length of their sentences. However, in affirming their convictions, the Second Circuit appears to have succumbed to the temptation caused by the "war on drugs" and applied an unarticulated exception to the Constitution for persons convicted of narcotics offenses. No other rational explanation can justify the Second Circuit's ruling -- which is directly at odds with even the most basic notions of fairness.

While the due process clause does not guarantee that every decision reached will be factual or just, it does guarantee "that a decision will be reached by processes that are fair." *United States v. Wallace,* 448 F.Supp. 164, 166 (E.D. Va. 1978). *See also Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 321 (1985), *quoting Matthews v. Eldridge,* 424 U.S. 319, 344 (1976). Under the circumstances present here, no rational human being could think that the trial judge's handling of jury deliberations was fair.

As the jury broke for the evening on May 22, the pressure on juror #9 to resolve the deadlock was enormous. When deliberations resumed the next morning, it is a reasonable inference that juror #9 "snapped." That morning the jury stated that it had reached "an informal, unanimous agreement as to the guilt of the defendants," but that one juror had refused to cast a formal vote "due to fears relating to alleged threats he received prior to deliberations."

Upon receiving that note, the judge interviewed juror #9, who first described an incident that he claimed had occurred a week earlier in his driveway. Although the juror stated that he had a "fear" as a result of the incident, he also acknowledged that he had misgivings about the evidence and that fear had "not completely" motivated his vote.

At that point, although he was faced with difficult circumstances, Judge Bartels erred in his response to the situation. There was ample reason to believe that juror #9 had, at a minimum, blown any incident that had taken place out of proportion in an effort to relieve the pressure that had been brought to bear on him. To begin with, the juror had deliberated for six days without claiming to be in "fear" and without reporting the incident either to the judge or to any court personnel. His failure to report the incident was particularly telling because, on the day before his revelation, the judge had specifically called him into the robing room and told him "as far as we know no one knows your residence." That would have been the perfect time for the juror to disclose the incident, yet he remained silent, asking only if he was free to rejoin the others.

Other aspects of juror #9's account of the incident were also peculiar. Two men had supposedly accosted him in his driveway only to ask if he was on the Gotti jury and then simply turned to leave after he made a noncommittal response. The juror admitted that the incident "didn't bother him" at that point, but supposedly, for no articulated reason, it began to evoke fear in him four days later. Then, as pressure mounted during deliberations, juror #9 told his fellow jurors that he had had a "dream" or "premonition" that his address was known. That reference to a "dream" or "premonition" was a telltale sign that the incident lacked something of a factual basis.[7]

Thus, Judge Bartels was faced with a juror, known to be the only holdout for acquittal, who continued to express doubts about the government's case. The judge was further confronted with the distinct possibility that the juror was looking for a way to relieve the pressure and abandon the prolonged and heated deliberations. Under those circumstances, the judge was under an obligation to take whatever steps he could *not* to excuse the juror, and to determine whether he could put the incident aside

7. It is significant to note that, when defense counsel raised the possibility that juror #9's account of the incident may have been "an excuse to avoid an unpleasant duty and to get off the jury," they were echoing opinions that the prosecutors had expressed the previous day.

and cast a vote that reflected his sincere opinion as to the weight of the evidence.

In *United States v. Hernandez,* 862 F.2d 17 (2d Cir. 1988), *cert. denied,* 109 S.Ct. 1170 (1989), a case also tried by Judge Bartels, the Second Circuit was confronted with another situation where a juror holding out for acquittal was excused. The Second Circuit emphasized in *Hernandez* that the "removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." *Id.* at 23. The convictions in *Hernandez* were reversed because, in part, the court could not be confident that Judge Bartels had not removed the holdout to avoid a hung jury. *Id.*

Had the Second Circuit "meticulously scrutinized" the record in this narcotics case, it would have been evident that Judge Bartels failed to take adequate steps to avoid excusing the holdout juror. On the contrary, he wholeheartedly embraced the juror's account of the incident in his driveway so that the juror could be excused and a mistrial avoided. Absent from the record is any firm or even half-hearted attempt to remind the juror that his duty was to decide the case based solely on the evidence, putting aside the incident. Similarly absent is any assurance that the incident may have been innocent, or even an instruction not to hold it against the defendants, who had not been linked to it in any way. Finally, the judge never even bothered to ascertain whether the juror could ignore the incident and render a fair vote despite what had occurred.[8]

Under the circumstances, it is plain that Judge Bartels, as well as juror #9, were grateful for a "way out." Indeed, the record reflects that the judge had begun to consider using Fed.R.Crim.P. 23(b) to excuse the juror even before the "incident" had surfaced. Thus, when the juror reported the

8. Judge Bartels' one attempt to ask that question was to inquire whether the juror could render a fair and impartial verdict "after having such fear generated by those two men." Significantly, the juror never answered that question with certitude. Rather, he replied "up to a point" and explained that he had been "on course" with the other jurors until Saturday evening. The juror was never asked whether his vote would have been the same despite his fear, even though he had given repeated indications that he was unpersuaded by the government's case.

incident, the judge was all too willing to accept the juror's "fear," ask him leading questions with the intention of highlighting it, excuse him from the jury, and proceed to a final verdict. As in *Hernandez,* one cannot read this record without the disturbing sense that Judge Bartels handled the matter as he did so as "to avoid a hung jury."[9]

Petitioners are aware that a trial judge must have discretion in handling jury deliberations. Plainly, however, that "discretion" must have its bounds and must be more than a mechanism through which to affirm convictions. The decision to excuse the only holdout for acquittal, if ever proper, should be made only when the record convincingly demonstrates that that juror could not sit under any circumstances.

Here, for the reasons indicated, Judge Bartels' decision to excuse juror #9 was grossly unfair. Had that been the totality of the court's error, this case, in certain respects, would have been similar to many others. Here, however, the judge committed a further error which was so manifestly unjust that it cries out for reversal.

Ostensibly, Judge Bartels dismissed juror #9 -- a holdout juror -- because the incident in his driveway left him so "fearful"

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9. It is striking to compare the Second Circuit's opinion in this case with its opinion in *United States v. Aiello,* 771 F.2d at 621. In *Aiello,* an anonymously empaneled juror received two phone calls after the close of the evidence asking if she was serving on the jury. The juror immediately called the FBI and described herself as "terrified." The next morning, a strange man, with the same voice the juror had heard on the telephone, approached her car as she was leaving for the courthouse. The juror immediately reported the incident to the trial judge and told him that she was "scared" and that she could not be "positive" if she could be impartial. She stated that she was "having difficulty in being fair" because of her fear. The judge, however, asked leading questions suggesting to the juror that she could indeed be fair. He kept her on the case, and the ensuing conviction was affirmed by the Second Circuit. In reaching that result, the court noted that the juror had not actually been threatened and that the jurors had subsequently been sequestered. No information about the incident had reached the other jurors. The juror's response, "I think so," to the question whether she could be fair was viewed as reflective of her ability to continue to sit as a juror. *Id.* at 629-30. Clearly, the incident in *Aiello,* and the juror's "terrified" reaction to it, were far more virulent than whatever occurred in this case. Yet, that juror continued to sit, while in this case juror #9 -- the lone holdout for acquittal -- was excused.

that he had to be disqualified. However, after viewing the incident and the juror's reaction to it so seriously, inexplicably, he did *absolutely nothing* prior to the return of a guilty verdict to determine whether the incident and all of the attending circumstances had affected any of the other jurors.

In other situations where jurors have been involved in potentially threatening episodes, courts have emphasized the need to prevent the taint from spreading to other jurors. Verdicts have been allowed to stand only where the other jurors did not learn of the threatening incident or where the court conducted a *timely* and thorough inquiry sufficient to rule out potential prejudice.

For instance, in *United States v. Badalamenti,* 663 F.Supp. 1539, 1541 (S.D.N.Y. 1987), *aff'd sub nom United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989), after a juror's daughter received a threatening telephone call, the juror was excused primarily so that the other jurors would not learn of the incident. The district judge commented that, if the juror mentioned the incident to the others, the result likely would have been "panic" that "almost certainly [would] have meant a mistrial." *Id.* That case, like this one, involved defendants alleged to be notorious criminals and anonymous jurors likely to be unusually sensitive to perceived threats to their personal safety.

In *United States v. Aiello,* 771 F.2d at 621, where a juror also had a threatening encounter, the Second Circuit noted that "the mere knowledge of the existence of the approach to one juror might adversely affect other jurors." However, in *Aiello* the trial judge was able to make a specific finding that the jury had not been tainted after all twelve jurors were promptly and separately questioned.

Similarly, in *United States v. Miller,* 381 F.2d 529 (2d Cir. 1967), *cert. denied,* 392 U.S. 929 (1968), one juror was involved in a threatening incident with a stranger at a cocktail party. The trial judge immediately ascertained that the juror had told two other jurors about the incident, and he questioned all three jurors about their ability to render a fair judgment in light of the episode. The Second Circuit held that the examination of all of the jurors who had heard about the incident was sufficient to protect the integrity of the trial, although the court stated that

the jurors should have been interviewed individually, rather than collectively, "since this would have somewhat reduced the risk of a juror's being unwilling to admit susceptibility to extraneous influence." *Id.* at 539. *Compare Remmer v. United States,* 347 U.S. 227 (1954) (judgment vacated where trial judge took no action and held no hearing after juror reported a tampering incident).[10]

Although the precise response to situations involving potential jury contamination must be left to the judge's discretion, it is also clear that the judge must do something. "Due process means a jury capable and willing to decide the case solely on the evidence before it and a trial judge ever watchful to present prejudicial occurrences *and to determine the effect of such occurrences when they happen.*" *Smith v. Phillips,* 455 U.S. 209, 217 (1982) (emphasis added). In this case, Judge Bartels knew that juror #9 had purportedly become fearful and had told the other jurors of the incident in a tearful manner. He also knew that this was a sensational case, with anonymous jurors, involving serious charges against men who were repeatedly portrayed as dangerous criminals. The reasoned exercise of discretion required, at a bare minimum, that the judge grant the defense request that he undertake a prompt

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10. In a host of other situations, not involving alleged threats, but involving extra-record information or publicity reaching jurors, or improper comments made by jurors, the Second Circuit had previously made it clear that trial judges were required to undertake some inquiry, suitable to the circumstances, to determine the extent of any prejudice or jury taint. *See, e.g., United States v. Hockridge,* 573 F.2d 752, 756 (2d Cir.), *cert. denied,* 439 U.S. 821 (1978) (juror remarked, prior to deliberations, that the defendants were "guilty"; trial judge held to have acted properly to contain "spread of taint" by conducting *in camera* interviews); *United States v. Hillard,* 701 F.2d 1052, 1063-64 (2d Cir.), *cert. denied,* 461 U.S. 958 (1983) (judge properly reacted to juror's spread of extra-record information by interviewing three jurors and giving cautionary instruction); *Sher v. Stoughton,* 666 F.2d 791 (2d Cir. 1981) (anonymous calls to jurors urging conviction; trial judge held to have cured prejudice by prompt, individual voir dire of each juror coupled with "careful instructions"); *United States v. Gaggi,* 811 F.2d 47, 51-53 (2d Cir.), *cert. denied,* 482 U.S. 929 (1987) (prejudicial publicity properly handled by voir dire of each juror); *United States v. Lord,* 565 F.2d 831, 837-39 (2d Cir. 1977) (jurors exposed to prejudicial publicity should be examined individually to determine extent of exposure and effect on juror's attitude).

inquiry to determine what the other jurors had been told, and what impact the incident may have had on them.[11]

The events that occurred during deliberations in this case are most comparable to events that took place in *United States v. Ferguson*, 486 F.2d 968 (6th Cir. 1973). In *Ferguson*, a sitting juror discussed the case with a friend, who also was a friend of a defendant. The judge excused the juror, substituted an alternate, and then promptly polled the other jurors to determine what they had learned and whether there was any taint. At least one other juror had spoken with the juror who had been excused. That juror was interviewed individually, and he denied any impact on his ability to serve. Nevertheless, the Sixth Circuit reversed the defendant's conviction, even though it recognized that the situation may have been "indicative of a possible attempt by defendants to influence the jury improperly." *Id.* at 972. After noting that "jurors are human beings, subject to the same suspicions, perhaps subconsciously, as all other persons," the court stated that the presumption of prejudice arising out of the incident had not been overcome and that even the judge's prompt actions were not enough to ensure the integrity of the proceeding:

> The district judge acted commendably in his attempts to eliminate any possible prejudice so that the trial could proceed. *Unfortunately the matter did not come to the*

11. Even before the trial court learned what juror #9 had said in the jury room on the morning of May 23, there was ample reason to be concerned that deliberations had been tainted. The judge knew that one or more jurors had voiced the thought that a vote for acquittal could involve a grand jury investigation and possibly lead to imprisonment. Although the judge reassured juror #9 on that score, he said nothing to the other jurors either to dispel that poisonous misimpression or to determine from whom it had originated. On top of that, although the record does not disclose the other jurors' reactions to the incident involving juror #9, plainly some of them shared the fear that led the judge to excuse him. In fact, one or more of the remaining jurors even suggested to juror #9 that the judge could authorize the construction of a fence around his property. Thus, depending on how the story came out in the jury room, some of the jurors may well have believed that the defendants had deliberately threatened one of their fellow jurors. Under those circumstances, it was imperative that the judge undertake some inquiry to determine the effect of juror #9's incident on the remaining jurors.

> *attention of the court until after [the juror] had already discussed the case with other jurors. By then it was too late. Id.* (emphasis added).

Although the Second Circuit in this case pointed to the polling of the jurors after the verdict as sufficient to overcome the presumption of taint, as the Sixth Circuit observed in *Ferguson*, "jurors are human beings." Given the events of the two days that preceded the formal verdict, the timing and manner of the inquiry, the nature of the case and all of the surrounding circumstances, it is unlikely that any juror would have had the temerity to express in open court any misgivings about the process through which the verdict had been reached.[12] In this case in particular, Judge Bartels should not have blindly accepted the jurors' responses, especially given that, before he polled the jurors, he had thanked them for their "outstanding devotion" to their "important work," congratulated them for their "good service," and conveyed his "gratitude" and "thanks."[13]

Although petitioners cited *Ferguson* to the Second Circuit, the court ignored the case as well as several other arguments

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12. In analogous circumstances, the Second Circuit has noted that "a juror's statement that he remained impartial in the face of a potentially prejudicial influence is not conclusive." *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980); *see also United States v. Lord*, 565 F.2d 831, 837-39 (2d Cir. 1977) (where jurors have been exposed to prejudicial matter, it is "not enough to assume" that jurors will faithfully abide by the court's instructions). The Second Circuit likewise has recognized "the normal juror's disinclination to impeach his rendered verdict." *Rattenni v. United States*, 480 F.2d 195, 198 (2d Cir. 1973). Similarly, this Court has cautioned against a blind acceptance of jurors' assurances of fairness, observing that "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin v. Dowd*, 366 U.S. 717, 727 (1961).

13. Here, as in *United States v. Hernandez*, 862 F.2d at 24, Judge Bartels' remarks thanking the jurors would not have been inappropriate if the jurors were to be immediately excused. However, if the jurors were about to be questioned about their fairness and the integrity of their verdict, "such remarks were the last things that should have been said." *Id.* at 24. Like in *Hernandez*, the effect of thanking the jurors for their good service "was surely to eliminate any possibility" that a juror would cast the verdict into question. *Id.*

that petitioners had advanced. The Second Circuit's refusal to accept the reasoning in *Ferguson*, or even to distinguish the case, was a stark refusal to give petitioners -- alleged drug dealers -- their due under the law. The Second Circuit's opinion alludes pointedly to the fact that this was the "third trial of the charges" against petitioners. (6a, 34a) One is left to wonder whether the Second Circuit's ruling would have been different if it had been petitioners' first trial or if petitioners had been politicians or stockbrokers.

Indeed, the Second Circuit's reasoning is so blatantly inconsistent in addressing different aspects of the jury deliberations that the court had to be operating on the principle that the ends -- affirming the conviction of alleged drug dealers which had resulted only after three long trials -- justified the means -- trampling upon their due process right to a fair and impartial jury. On one hand, the court approved the decision to excuse juror No. 9, the lone holdout for acquittal, on the ground that he was "disabled by fear from continuing to participate in the jury's deliberations." (33a) On the other hand, the court brushed away the fact that eleven other jurors had been exposed to the same information and concluded by *ipse dixit* that the trial judge had "discretion" to order that they proceed to verdict.

That result is indefensible, and the Second Circuit's opinion expresses little in the way of a defense for it. Fed.R.Crim.P. 23(b), which the court cited as the underpinning of its ruling (32a), is completely irrelevant to the issue concerning the taint of the eleven remaining jurors. Rule 23(b) simply permits a judge to excuse a single juror for "just cause" during deliberations, and to accept a verdict from the remaining jurors.[14]

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14. The manifest purpose of the rule was to prevent an automatic mistrial when *one* juror becomes unable to continue. See Advisory Committee Comment, Fed.R.Crim.P. 23(b) (rule deals with situation in which "*one of the jurors* is seriously incapacitated or otherwise found to be unable to continue service upon the jury.") Nothing in the rule sanctions the receipt of verdicts when more than one juror is exposed to the kind of prejudicial information that reached the jurors in this case. Similarly, nothing in the rule speaks to the question of

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Beyond Rule 23(b), the Second Circuit offered nothing in defense of its ruling. In particular, the court ignored petitioners' claim that, following the dismissal of juror #9, the record already was sufficient to compel the granting of a mistrial because all of the remaining jurors had learned of the alleged incident.

Rather than confronting that argument, the Second Circuit skirted the issue by citing cases that indicate generally that district judges have "discretion" to deal with juror irregularities. The court placed principal reliance on *United States v. Moten*, 582 F.2d 654 (2d Cir. 1978), where the court stated that in-depth questioning of jurors about jury tampering incidents may prejudice the jurors and, therefore, do more harm than good.

Moten, however, dealt with a completely different situation. Although there was an alleged jury tampering incident in *Moten*, that case made it clear that the other jurors had not been made aware of it. *Id.* at 657. It was in that context -- where the concern was that the other jurors *would learn* of the incident -- that the court stated that "'if the members of the jury are questioned in depth about a possible jury tampering incident, they may become so prejudiced that the accused cannot obtain a fair trial.'" (34a, *quoting Moten*, at 661) Properly read, therefore, *Moten* actually supports petitioners' position because it indicates a strong concern that jurors who are exposed to the kind of prejudicial information that reached the jurors in this case will be rendered incapable of returning a fair and impartial verdict.

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how to determine whether jurors are tainted in such a manner as to make them incapable of returning a fair and impartial verdict.

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE THE PROPER SCOPE OF THE TESTIMONY OF A GOVERNMENT "DRUG EXPERT" IN A CRIMINAL CASE.

The Second Circuit's opinion constitutes a significant and unwarranted departure from prior case law which had set appropriate limits on the proper bounds of expert testimony in narcotics cases. In contrast to concerns expressed in earlier Second Circuit cases such as *United States v. Mang Sun Wong,* 884 F.2d 1537 (2d Cir. 1989), *cert. denied,* 110 S.Ct. 1140 (1990), and *United States v. Tutino,* 883 F.2d 1125 (2d Cir. 1989), *cert. denied,* 110 S.Ct. 1139 (1990), the court has now explicitly held that an expert witness in a narcotics case can testify as to his own interpretations and conclusions of taped conversations. (45a) Because that ruling -- aside from being erroneous -- also conflicts with recent decisions of other circuits,[15] petitioners urge that this Court grant certiorari to resolve the conflict.

The government's case against petitioners rested, virtually in its entirety, on the tapes made from the electronic surveil- lance of Ruggiero's home. Over vigorous defense objections, the government's expert, Agent Franciosa, was repeatedly allowed to provide the jury with a roadmap through the taped conversations even where they contained no specialized codes or jargon.

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15. *See, e.g., United States v. Vastola,* 899 F.2d 211, 233 (3d Cir. 1990) ("opinion testimony regarding the substance of recorded conversations ... is admissible only to assist in the jury's interpretation of coded portions of the conversation .... Where the statements are clear, such opinion testimony is not helpful to the trier of fact and is inadmissible under both Rules 701 and 702"); *United States v. Doe,* 903 F.2d 16, 19-20 (D.C.Cir. 1990) (conviction reversed because testimony of government drug expert went far beyond the "'preparation' and 'distribution' of cocaine and crack in Washington" or the modus operandi of drug dealers); *United States v. Dicker,* 853 F.2d 1103, 1109-10 (3d Cir. 1988) ("[a]lthough courts have construed the helpfulness requirement of Fed.R.Evid. 701 and 702 to allow the interpretation by a witness of coded or 'code-like' conversations, they have held that the interpretation of clear conversations is not helpful to the jury and, thus is not admissible under either rule).

He was also permitted to paraphrase the conversations in an explicit, highly incriminating fashion. At trial, typically the prosecution would play a tape-recorded conversation and then ask Franciosa for his conclusions and interpretations. The defendants contended that existing Second Circuit case law prohibited such "expert testimony."[16]

The Second Circuit's explicit holding that an expert witness may properly testify concerning his interpretation and characterization of taped conversations so long as the expert does not "do so in terms of the applicable legal criteria" virtually eviscerates all limitations upon expert testimony. (45a) Were that the law, an expert witness could provide the government, as Agent Franciosa did in this case, with a preliminary summation cloaked under the guise of expert testimony. That is precisely the evil that the Second Circuit previously had sought to avoid in earlier cases where expert testimony as to interpretations and conclusions had been condemned.[17] The vice

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16 The Second Circuit's opinion began with a review of certain basic principles which petitioners had not challenged, including the observation that "the operation of narcotics dealers are a proper subject for expert testimony under Fed.R.Evid. 702." Slip op. at 8040. However, petitioners' contention was not that Agent Franciosa should not be permitted to inform the jury about the tactics and methods employed by drug dealers or to clarify cryptic or encoded language used on the tapes. Rather, petitioners' claim was that Agent Franciosa should not have been permitted to interpret and draw conclusions from the evidence, to make connections between different pieces of evidence and to identify the roles of the participants in various drug transactions.

17. In *Mang Sun Wong*, although the Second Circuit stated, "[t]here is force ... in Wong's contention that LaMagna was drawing conclusions from the evidence, rather than merely testifying to the jargon and practices of the drug trade," it concluded that reversal was unwarranted because the defendant had opened the door to the inquiry and because it had involved only a single question and answer. *See also United States v. Garcia*, 848 F.2d 1324, 1335 (2d Cir. 1988), *rev'd on other grounds*, 109 S.Ct. 2237 (1989) (expert testimony subject to challenge when expert interprets and draws conclusions from evidence instead of simply testifying as to the jargon of the drug trade); *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 1018 (1988) (court expressed "discomfiture" with use of expert testimony to explain intercepted conversations because such "use of expert testimony may have the

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of such testimony is that it is given under oath and, thus, the jury receives it as evidence rather than argument.

For example, at one point, there was a taped reference to "George," in which Ruggiero purportedly told petitioner Carneglia that "George don't want to do nothing with nobody else but us." Franciosa was permitted to "interpret" that conversation as meaning that "George is giving Mr. Ruggiero an exclusive when that shipment of drugs comes into the country." That testimony, and dozens of other similar exchanges, feature the agent giving his conclusions and interpretations, rather than simply informing the jury about narcotics jargon or practices.

Frequently, the taped excerpts that the agent "interpreted" were bits of conversation that were in plain, everyday English. Franciosa's role was simply to state, as sworn fact, that the references were drug-related. For instance, in one taped conversation, a man named Lino stated "I will have like two or three weeks to come up with the money." Franciosa was then asked to "tell us what he's saying at this point," and his response was that Lino was telling Ruggiero "that he's receiving the cocaine on consignment. He's not paying any money. He will receive the drugs and you will have two to three weeks to come up with the money." That testimony was improper because it was for the jury to decide whether the conversation had referred to a drug transaction. The agent's "expert" opinion that it did simply cast him in the role of "oath helper," rather than adding substantively to the jury's understanding of what had been said.

Numerous similar examples abound throughout Franciosa's testimony. In another conversation between petitioner Gotti and Ruggiero, the tape depicted Ruggiero as telling Gotti:

> "maybe this is a novelty to you, you know, maybe this is an expense to you. This is my livelihood. ... This is all that we got going; me and you."

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effect of providing the government with an additional summation by having the expert interpret the evidence").

Upon being asked to testify about "what's being discussed," Franciosa replied that Ruggiero's "livelihood" is the "drug business" and that the reference to "this is all that we got going" likewise referred to the "drug business." At another point, the prosecutors played a tape on which Ruggiero said, "I have to continue with my brother's thing." The following ensued:

> Q: .... In your opinion what is Mr. Ruggiero -- when Mr. Ruggiero says, my brother's thing --
>
> A: His brother's narcotics business.

Just a few pages later, when a tape was played on which Ruggiero stated that he was "going to continue it," the prosecutor asked Franciosa: "What is Mr. Ruggiero referring to when he says, 'Going to continue it.'" The agent responded that Ruggiero was "talking about his brother's narcotic business."

The thrust of Franciosa's testimony was to imbue the government's theory of the case with the "aura of special reliability and trustworthiness" that surrounds expert testimony. *United States v. Young,* 745 F.2d 733, 766 (2d Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985). Substantively, it was no different from asking the agent to listen to all of the government's evidence and then to tell the jury, in his expert opinion, that the defendants were guilty.

At other points, Franciosa opined that particular conversations were related, or that a person mentioned on one tape had been identified in a subsequent conversation. In other instances, Franciosa used taped references to other persons as a springboard for testifying about the role of those persons within the drug conspiracy. For instance, a taped reference to a person named "George" elicited the following testimony:

> A reference to George, George is another source of supply for drugs. And when Mr. Ruggiero is saying when is coming, when his, when his drug shipments comes into the country we move, means when that does come in, we'll take that shipment of drugs and sell it ....

> So it's apparent, my opinion, that the source of supply, George is giving Mr. Ruggiero an exclusive when that shipment of drugs comes into the country.

At another point, Franciosa was asked what was referred to in a conversation between Ruggiero and Gotti, and he answered that the conversation indicated that Ruggiero was a supplier of drugs to Gotti. On another occasion, Franciosa also supplemented his opinion with editorial comments that certain facts were "clear" from the tapes. For example, when asked to explain a taped reference to "Arnold, Funzi and Mark," he responded "it's clear that Arnold, Funzi and Mark are customers of Mr. Gotti and Mr. Ruggiero. It's clear that they are giving them drugs on consignment."

It is difficult in a petition for certiorari to capture and convey the full extent of Franciosa's testimony. Suffice it to say that it was outrageous and unparalleled, as the government used it to provide running summations on its evidence. A full reading of his testimony can leave no doubt as to its prejudicial impact.

III

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE TARGET OF AN ORDER AUTHORIZING ELECTRONIC SURVEILLANCE AT ANOTHER TARGET'S HOME HAS STANDING TO CHALLENGE A VIOLATION OF THAT ORDER.

Certiorari should be granted because the Second Circuit erroneously limited its opinion to an analysis of whether petitioners had standing to assert a minimization violation. By failing to fully consider violations of the order authorizing electronic surveillance, the court did not adequately consider the impact of its earlier decision in *United States v. Gallo,* 863 F.2d 185 (2d Cir. 1988), *cert. denied,* 109 S.Ct. 1539 (1989). Certainly, to the extent that violations of the court order were not co-extensive with a minimization violation, the defendants need only have shown that they were "aggrieved persons" within the

meaning of 18 U.S.C. §2518(10)(a) in order to establish standing.

Section 2518(10)(a) provides that any "aggrieved person" may move to suppress evidence when "the interception was not made in conformity with the order of authorization." By establishing that their conversations were intercepted in violation of the order authorizing surveillance, petitioners fell squarely within the definition of "aggrieved persons" because, as named targets, they were the victims of the surveillance. Indeed, in *Gallo* the Second Circuit's determination that the defendants lacked standing to challenge a violation of the court's order was predicated upon the crucial finding that they were neither *targets* of the investigation nor *participants* in the conversations which had been intercepted. Consequently, the court reasoned that those defendants were not "persons aggrieved" by the unlawful surveillance and, thus, that they lacked standing to challenge the surveillance.

Although the Second Circuit has in the past relied on this Court's decision in *Alderman v. United States*, 394 U.S. 165, 172 (1988) for the principle that defendants such as Gotti and Carneglia lack standing where there is no "invasion of their privacy," *see United States v. Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 92 S.Ct. 2041 (1972) and *United States v. Fury*, 554 F.2d 522, 526 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978), petitioners submit that the Second Circuit's interpretation of *Alderman* is at variance with the statutory standard in 18 U.S.C. §2510(11). Section 2510(11) defines an aggrieved person as "a person who was a party to the intercepted wire, oral or electronic communication or a person against whom the interception was directed." On the other hand, the Second Circuit's interpretation of *Alderman* has omitted the second half of this Court's holding in that case. A careful analysis of *Alderman* reveals that this Court gave standing to those individuals who were "victims" of the search and refused standing only to those who sought to suppress solely on the basis that the evidence would be used against them. *See Jones v. United States*, 362 U.S. 257, 261 (1960).

Here, petitioners were "victims" of the search because they were named targets and because their voices were seized. To

hold otherwise would be to reach a result not intended by the clear language of the statute. To read the statute otherwise would remove from the statute the requirement of compliance with a court order.

Having erroneously concluded that petitioners lacked standing, the court of appeals, in short strokes, deferred to the district court's ruling concerning the issue whether the surveillance had been conducted in conformity with the court order and minimization requirements. Petitioners submit that, if the Second Circuit had recognized that they had standing, a more detailed analysis of the record would have revealed that the authorizing order had been violated. Indeed, testimony before the district court had fully supported petitioners' contention that live monitoring was ongoing twenty-four hours a day, each day that the surveillance was conducted. The government agents themselves testified to those facts, which demonstrated conclusively that the authorizing order had been violated. If the Second Circuit's erroneous standing ruling is reversed, a detailed analysis of the record will demonstrate that the tapes should have been suppressed.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Dated: New York, New York
August 12, 1991

RONALD P. FISCHETTI
Attorney for Petitioner Gene Gotti
757 Third Avenue
New York, New York 10167
(212) 593-7100

GERALD L. SHARGEL
Attorney for Petitioner John Carneglia
150 East 58th Street
New York, New York 10155
(212) 486-1717

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 629, 630 - August Term, 1989
(Argued January 18, 1990 Decided March 22, 1991)
Docket Nos. 89-1354, 89-1355

UNITED STATES OF AMERICA,
Appellee,

-v.-

ANGELO RUGGIERO, ET AL.,
Defendants,

GENE GOTTI and JOHN CARNEGLIA,
Defendants-Appellants.

Before:
FEINBERG, PRATT, and MAHONEY,
Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, for racketeering conspiracy in violation of 18 U.S.C. § 1962(d) (1988), narcotics conspiracy in violation of 21 U.S.C. § 846 (1988), and possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1988). Appellant

Appendix A
Opinion of United States Court of Appeals

Carneglia was also convicted of traveling in interstate commerce to promote and facilitate the conduct of a narcotics business enterprise in violation of 18 U.S.C. § 1952 (1988).

Affirmed.

MARK F. POMERANTZ, New York, New York (Ronald P. Fischetti, David T. Grudberg, Fischetti Pomerantz & Russo, New York, New York, of counsel), *for Defendant-Appellant Gene Gotti.*

GERALD L. SHARGEL, New York, New York (John L. Pollok, Hoffman & Pollok, New York, New York, of counsel), *for Defendant-Appellant John Carneglia.*

MATTHEW E. FISHBEIN, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, David C. James, John Gleeson, Robert P. LaRusso, Assistant United States Attorneys for the Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee United States of America.*

Appendix A
Opinion of United States Court of Appeals

MAHONEY, *Circuit Judge:*

Appellants Gene Gotti and John Carneglia appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, following a jury trial, for racketeering conspiracy in violation of 18 U.S.C. § 1962(d) (1988), narcotics conspiracy in violation of 21 U.S.C. § 846 (1988), and possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1988); and, in the case of Carneglia, for traveling in interstate commerce to promote and facilitate the conduct of a narcotics business enterprise in violation of 18 U.S.C. § 1952 (1988).

They contend on appeal that (1) the trial court committed reversible error in rulings with respect to the dismissal of a juror during jury deliberations and the jury's subsequent rendition of verdicts; (2) evidence and leads derived from certain electronic surveillance should have been suppressed because of minimization violations; (3) certain tape recordings were received in evidence without adequate authentication; (4) improper expert testimony regarding drug transactions was admitted; and (5) the district court improperly relied upon *in camera* testimony in sentencing Gotti and Carneglia.

We affirm.

Appendix A
Opinion of United States Court of Appeals

Background

A. *Procedural History.*

The procedural history of this case is lengthy and complex, and we summarize it only briefly here. We assume familiarity with two prior opinions, *United States v. Ruggiero*, 678 F. Supp. 46 (E.D.N.Y. 1988) ("*Ruggiero I*"), and *United States v. Ruggiero*, 846 F.2d 117 (2d Cir.), *cert. denied*, 488 U.S. 966 (1988) ("*Ruggiero II*"), which treat in more detail certain of the matters hereinafter considered.

The initial trial in this case commenced before District Judge Mark A. Costantino and an anonymous jury on June 1, 1987. On October 22, 1987, the government initiated an investigation, based upon information from confidential sources, to ascertain whether efforts were being made to compromise the jury. *See Ruggiero I*, 678 F. Supp. at 47. The investigation resulted in a seriatim voir dire of the individual jurors on January 11, 1988 to determine whether any of them had been compromised, and a hearing with regard to the jury-tampering issue before Judge Costantino that commenced on January 13, 1988. *See Ruggiero II*, 846 F.2d at 120. Upon conclusion of the hearing, the government moved for a mistrial on January 19, 1988. *See id.* at 121.

Later that day, the United States District Court for the Eastern District of New York convened in banc to consider whether the government had made spurious charges of jury tampering to provoke a mistrial, ruled that

the charges were appropriate and bona fide, observed that "[a]ny publicity arising from the United States Attorney's application, which may have come to the attention of some jurors and resulted in their doubting their ability to decide the case fairly was not due to the fault of the United States Attorney," *id.* at 122, and concluded that the question whether and when to order a mistrial was properly left to the trial judge. *See id.* at 121-22.

Judge Costantino thereupon declared a mistrial in *Ruggiero I*, concluding "that there is a very high degree of likelihood that the panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants." 678 F. Supp. at 48. The case was then reassigned to then-District Judge Joseph M. McLaughlin, who severed the case into four parts, one of which is the subject of the instant appeal.

The defendants moved to bar a retrial on double jeopardy grounds, contending that Judge Costantino had erroneously declared a mistrial. *See Ruggiero II*, 846 F.2d at 122. Judge McLaughlin denied the motion, an interlocutory appeal was taken, and we affirmed in *Ruggiero II*, finding that the "testimony presented at the [district court] hearing and the information the FBI received from confidential sources" supported the district court's finding "that there was a 'distinct possibility' of jury

tampering." 840 F.2d at 123-24.[1] Gotti and Carneglia were then tried, together with Angelo Ruggiero, before Judge McLaughlin, resulting in a second mistrial when the jury was unable to reach a unanimous verdict.

After being reassigned to Judge Bartels, the third trial of Gotti and Carneglia commenced on April 17, 1989 on the basis of a five-count redacted, superseding indictment.[2] Count one charged that from in or about February 1982 until the date of the filing of the indictment, Gotti, Carneglia, and others conspired to make money by engaging in a pattern of racketeering activity, including, but not limited to, the distribution of heroin, in violation of 18 U.S.C. § 1962(d) (1988). Count two charged Gotti, Carneglia, and Ruggiero with taking part in a continuing criminal enterprise between February and June 1982 with five or more individuals with respect to whom Gotti, Carneglia, and Ruggiero occupied "the position of organizer, supervisor and manager," from which activities they obtained substantial income and resources, in violation of 21 U.S.C. § 848 (1988). Count three charged that between February and June 1982, Gotti, Carneglia, and others conspired to distribute and possess with intent to distribute heroin in violation of 18 U.S.C. § 846 (1988). Count four charged that on or about June 11,

1. We derived the "distinct possibility" standard from *United States v. Mastrangelo*, 662 F.2d 946, 952 (2d Cir. 1981), *cert. denied*, 456 U.S. 973 (1982).

2. Ruggiero was not tried a third time because Judge Bartels determined that he was physically unable to stand trial as a result of illness. Ruggiero subsequently died.

1982, Carneglia and Ruggiero travelled in interstate commerce from LaGuardia Airport in New York to West Palm Beach in Florida to promote and facilitate the conduct of a narcotics business enterprise in violation of 18 U.S.C. § 1952 (1988). Count five charged that on or about June 23, 1982, Gotti, Carneglia, and others possessed with the intent to distribute approximately two kilograms of heroin in violation of 21 U.S.C. § 841(a)(1) (1988).

At the close of the government's case, the court granted defendants' motion to dismiss the continuing criminal enterprise count. On May 23, 1989, the jury returned a verdict finding Gotti and Carneglia guilty on the remaining counts with which they were charged. Gotti was sentenced to twenty years on count one, fifteen years on count three, and fifteen years on count five, all to run consecutively for a total of fifty years. He was also sentenced to a three-year term of special parole with respect to count five, and assessed a fine of $75,000. The same sentence was imposed upon Carneglia, with the addition of a five-year concurrent sentence on count four.

B. *Events At and Preceding Trial.*

On November 9, 1981 special agents of the Federal Bureau of Investigation (the "FBI") applied for and received court authorization to intercept communications being conducted over a telephone in a house occupied by Ruggiero at 163-36 88th Street, Howard Beach, New York. In the months prior to the application, FBI agents had been in contact with confidential informants who had

reported that Ruggiero was a member of the Gambino organized crime family, which engaged in extortionate extensions and collections of credit and illegal gambling, and that he conducted conversations over the telephone at the above address regarding those activities.

The interception of telephone calls continued at the Howard Beach location until December 1, 1981, when Ruggiero moved to a new residence located at 370 Barnard Avenue, Cedarhurst, New York. Following the move, on December 29, 1981, agents applied for and received authorization to intercept telephone conversations from the two telephones located in Ruggiero's Cedarhurst home for a period of thirty days.[3]

On April 5, 1982, in addition to receiving authorization to intercept wire communications for an additional thirty days, agents applied for and were given authority to place electronic surveillance devices in several rooms of Ruggiero's Cedarhurst home. This authorization was extended by subsequent thirty-day orders on May 7, 1982 and June 7, 1982.

Over the course of this surveillance, agents gathered tapes evidencing that Ruggiero and defendants Gotti and Carneglia, in addition to their involvement in illegal gambling and loansharking, were principals in an extensive narcotics enterprise that distributed large quantities of

3. 18 U.S.C. § 2518(5) (1988) imposes a thirty-day limitation upon authorizations for the interception of wire, oral, or electronic communications.

heroin, and, to a lesser extent, cocaine and methaqualone tablets.

We have briefly described hereinabove the major events which occurred from the completion of the primary government investigation to the commencement of the third trial of Gotti and Carneglia before Judge Bartels. Gotti and Carneglia do not challenge the sufficiency of the evidence presented by the government at that trial, which consisted primarily of recordings of telephonic and other conversations resulting from the surveillance described hereinabove. Rather the "principal issue raised on the appeal," according to appellants' counsel, is "whether the trial judge erred in his handling of the events that took place after the jury retired to consider its verdict."

Counsel delivered their summations to the jury on May 16, 1989. Earlier that day, the office of the United States Attorney for the Eastern District of New York received a telephone call from an attorney representing a man named Walter Arnold, who was a resident of Kings Park, New York. The attorney reported that Arnold had received the following anonymous note:

> Walter Arnold
> 84 Broadview Ave.
> Kings Park, LI NY
>
> Dear Mr. Arnold:
>
> I am writing this letter as a concerned neighbor and friend.

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It has come to my attention that you are a juror on the Gotti trial. Our neighbor who lives on the same block, Federal Agent William Noon is in charge of the Gotti investigation.

As you know, Kings Park is a very small community. Our children go to the same schools, we shop in the same stores.

It seems improper that you be on the same jury where the head FBI agent in charge is your neighbor.

In all conscience you should bring this matter to the attention of the judge, goverment [sic] and the court.

I know you will do the right thing.

A Concerned Neighbor and Friend.

As it turned out, Arnold was not on the jury. However, the attorney reported that Arnold's neighbor, whose name was not mentioned, was a juror. It was subsequently determined that Walter Arnold's neighbor was anonymous Juror No. 9. Following this discovery, and prior to the commencement of jury deliberations, Judge Bartels dismissed Juror No. 9. and replaced him with alternate Juror No. 1.

On May 22, 1989, the sixth day of jury deliberations, the jury sent out the following note: "One juror refuses to

vote, are there any guidelines to help us." Judge Bartels decided to give an *Allen* charge, see *Allen v. United States*, 164 U.S. 492, 501-02 (1896), in response to that note. Defense counsel asked to see the proposed instruction before it was delivered, but Judge Bartels declined to allow this, stating: "On behalf of the United States District Court I'm not giving it to you." He then delivered the following instruction to the jury:

> I will read the note that the court received from the jury. One juror refuses to vote. Are there any guidelines to help us?
>
> Well, ladies and gentlemen of the jury, as you are aware in order to return a verdict in this case, each juror must agree thereto.
>
> In other words, your verdict must be unanimous. You should, therefore, consider this case, and deliberate upon it, and reach a verdict without fear or sympathy. You must remember at all times, that the government has the burden of proof beyond a reasonable doubt.
>
> Now, the jury in this case was selected carefully. When you filled out the juror questionnaire, and again when you were interviewed, each of you was asked, "is there any reason why you could not render a fair and impartial verdict in this case?" Each of you said "no". All jurors took an oath when the panel was picked in this case that they would try this case and, "a true

verdict rendered [sic] according to the evidence and the law."

So then, every juror swore to render a verdict. To render a verdict each juror must vote, one way or the other. The court is not interested which way you vote and reminds you that no juror should surrender his or her honest conviction as to the weight of effect of the evidence for the sole purpose of determining a verdict, and a juror should not hesitate to re-examine his own views and change his opinion if convinced it's erroneous, but he should vote.

The court is not interested who the juror is who has not yet voted and is not interested in the way the other jurors have voted or not voted. The matter is completely open. No juror, however, should in any way feel coerced by any comments I made.

Therefore, would you be kind enough to return to deliberate.

Later that day, the jury sent out another note, which read as follows: "While attempting to reach a decision concerning the innocence or guilt of the defendants, a juror refuses to discuss the case at all." Following a colloquy with counsel, Judge Bartels determined to conduct an individual voir dire of the juror who was referred to in the two notes, with all counsel present, and ascertain the reasons for the juror's failure to vote and to

deliberate. The defense objected, claiming "[i]t's an intrusion into the deliberative process."

The conference was then held in Judge Bartels' chambers. The juror in question turned out to be Juror No. 9 - the former Alternate Juror No. 1. Juror No. 9 indicated that the note was incorrect, and that he and all of the other jurors had voted following the court's *Allen* charge. He also stated that he had discussed the case "in my own way with them," adding that his fellow jurors had been "trying to persuade me to vote one way or the other," and that "I vote on my conscious [sic]." Juror No. 9 was then sent back to the jury room. At this point, the defense moved for a mistrial, and the court denied the motion.

Shortly after juror no. 9 returned to the jury room, Judge Bartels delivered a second *Allen* charge to the jury, over the defense's objection, as follows:

> I have received notice that the juror who you mentioned in your last memorandum has discussed the case and has voted.
>
> I have also received notice that you are deadlocked[4] and I'm going to ask you to try once more. This case has been on trial for over five and a half weeks and the jury has been sequestered for, approximately, five

4. Upon inquiry by defense counsel after this instruction was given, the court conceded that no note had been received to indicate that the jury was deadlocked.

and a half days. I do not believe that the case can be submitted to twelve men and women who are more intelligent or competent to decide it.

In order to return a verdict in this case each juror must agree thereto. In other words, your verdict must be unanimous if it's to be a verdict. However, you only have to vote and you do not have to agree. You can disagree amoung [sic] yourselves, but you do have to vote one way or the other. You do not have to bring in, however, a verdict on all the counts at the same time. In your deliberation, jurors have a duty to consult with each other, and to deliberate with a view to reaching an agreement if it can be done without violence to any individual judgment.

Although each juror must decide the case for himself, this should only be done after an impartial consideration of the evidence with his fellow jurors. In the course of your deliberation a juror should not hesitate to re-examine his own view and to change his opinion if convinced it is erroneous. Each juror who finds himself to be in the minority should reconsider his view in the light of the opinion of the jurors of the majority. Conversely each juror finding himself in the majority should give equal consideration to the view of the minority.

No juror should surrender his honest conviction as the weight or effect of the evidence of his fellow jurors or for the purpose of determining a verdict.

> But remember also that after full deliberation and consideration of all the evidence, it's your duty to try to agree upon a verdict if you can do so without violating your individual judgment and conscience.
>
> I'll ask you to retire and resume your deliberations for such time you in your conscientious judgment seems reasonable with the hope that you conscientiously reach an agreement.

The court then offered the jury the option of continuing its deliberations or retiring for the evening, and the jury returned to the jury room to consider the matter. A short time later, the jury sent out two notes. The first one stated: "The jury will stay late this evening and try to work things out." The second note read: "A juror requests a private conference with Judge Bartels."

In response to the second note, Judge Bartels instructed the jury that he could not have a private conference with an individual juror, but that any juror could ask him questions by sending him a note.

Thereafter, the court received a note from Juror No. 9, which read as follows:

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Att Judge Bartels:

There are two point [sic] I would like to address to you. No. (1) there were [sic] talk in the juror room concerning the fact that I could (go) to jail. And what would happen to my family left behind. Tollerence [sic], and patience is [sic] not prevailing in the juror room. No. (2) I strongly feel that my residence is known, and is [sic] very concerned for my family. I simply can't be persuated [sic] or forced to vote against my belief and conscience.

Yours truly
Juror #9

A colloquy between the court and counsel concerning this note ensued. Defense counsel suggested, as a "hypothetical," that Juror No. 9 was the lone holdout for acquittal, and that the other jurors had told him that he could go to jail unless he changed his vote. The government contended that the note evidenced that the juror had been threatened.

Judge Bartels then called Juror No. 9 into his chambers, with counsel present. The judge first assured the juror that there was no possibility of his going to jail. He then inquired whether the juror had voted, after specifying that he was not interested in which way he had voted. Juror No. 9 responded that he and all of the other jurors had voted. The judge then asked the juror to step

outside, and asked counsel whether there were any additional questions. Defense counsel responded in the negative and again moved for a mistrial. The government requested that the juror be sent back to continue deliberations, but raised the question of the juror's expressed fear that his residence was known. Judge Bartels then called the juror back in and told him: "[A]s far as we know no one knows your residence. You can go back and feel free on that."

At approximately 7:30 p.m. that same evening, the court called the jury into the courtroom and asked the foreman whether all jurors had voted. The foreman responded that all jurors had voted, and, while they had not yet reached a decision, he thought that they would have a verdict "this evening or tomorrow." Shortly thereafter, the jury retired for the evening.

The following morning, the jury sent out the following note:

> Over the course of the last seven days of deliberations, the jury has reached an informal, unanimous agreement as to the guilt of the defendants on the 4 counts involved in the indictment. However, due to the fears of one juror relating to alleged threats he received prior to deliberations, the jury is unable to reach a formal unanimous verdict on any of the 4 counts. It is the conclusion of the jury that this situation cannot and will not be resolved.

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The court ascertained that the juror referred to in the note was Juror No. 9, and called him into chambers to question him on the record with only law clerks and a court reporter present. To "achieve maximum candor and comfort," the court decided that counsel should not be present.

Juror No. 9 told Judge Bartels of an encounter with two men in the driveway of his home as he returned from church services at approximately eleven o'clock on the night of May 16 - the evening before the case was submitted to the jury and the jury was sequestered, and also the evening before he was substituted for the initial Juror No. 9.

> I drove into the driveway and opened the garage, when I opened the garage and put the light on, after I came out of the garage door, immediately standing behind my vehicle was [sic] two individuals. They didn't threaten me per se. They say, you are Mr. Edwards. . . . It was a black individual and a white individual to be bluntly [sic] and more specific. The black individual said good evening Mr. . . .
>
> I couldn't deny that I'm not Mr. Edwards [sic], and he said, you are on the Gene Gotti jury trial or something like that. I didn't say, yes or no. . . .They immediately turned around and left.

The juror described the two men as being "fairly well built, at least six feet, possibly six two." He did not know the men but assumed that they had been spectators at the

trial. Juror No. 9 explained that he did not initially notify the court of this incident because he was not then frightened: "It wasn't a threat per se as if you don't do this we'll do this to you or if you do this we'll do this to you or whatever."

On May 20, however, after returning to his hotel room from attending an evening church service, the juror had difficulty sleeping because, as he explained: "[F]or some reason or another it began to--it began to come to me, began to dawn on me as to why were those particular individuals in my driveway."

Juror No. 9 related that the other jurors first became aware that something was bothering him during the deliberations on May 22, the day that the jury sent out notes that one of the jurors had not voted. However, Juror No. 9 did not explain the true cause of his distress until the following morning. As he described the incident to Judge Bartels:

> I said well, I wanted to tell my fellow jurors, I want to share something with them. I think they deserve an explanation and at that point I told them in about two or three minutes in the conversation, I became filled up and I did begin to cry and I explained to all of them involved and I explained to them as to why.

He added that he had hoped to be able to "handle the load" personally, but was concerned for his wife and

daughter, both of whom had been institutionalized for mental problems.

The judge then questioned the juror regarding the effect of the visit by the two men upon his deliberations:

THE COURT: You have a fear because of that visit, is that true?

JUROR: Yes, sir, I do.

THE COURT: Therefore, because of that fear you voted the way you voted?

JUROR: That's true.

I didn't--I had questioned some of the testimony along the way, the various counts and whatever--

THE COURT: What do you mean the various counts?

JUROR: I said some of the testimony of the various counts.

THE COURT: I see.

JUROR: One and two of the charge or whatever and I went along for the most part, but-I was sort of hesitant. We had gone over this so much and so much and so much and the same

thing and I wasn't one hundred percent sure-my mind was wasn't one hundred percent sure of each of the counts and the accusation and things that they actually did happen.

* * * *

THE COURT: All I wanted to know is whether or not--whether or not fear motavated [sic] your vote?

JUROR: Not completely, but there was some aspects of it but not completely.

THE COURT: Not completely.

JUROR: Yes, sir.

The court had this voir dire transcribed immediately and made available to all counsel. The government moved for the dismissal of Juror No. 9 pursuant to Fed.R.Crim.P. 23(b). The defendants opposed the motion and moved for a mistrial, contending, *inter alia*, that Juror No. 9 had been voting his conscience and that the account concerning the two unknown men might have been a "ruse" to avoid further jury service. In light of this dispute, Judge Bartels decided to hold an additional voir dire of the juror, because, as he explained, "I want to know unequivocally, is he voting because of fear."

The judge called Juror No. 9 into chambers and asked him about the note he had written the previous day. The juror stated, "I made two points in that note." The first

point, according to the juror, was that "[a]t that point I felt I was being coerced, persuaded by my fellow jurors." Juror No. 9 stated that the other jurors had told him, "if I didn't do what was right, whatever, there could be a grand jury investigation" and that he could go to jail. The judge then addressed the second point mentioned in the note:

THE COURT: Nevertheless, your vote was motavated [sic] by fear?

JUROR: Yes, sir.

THE COURT: Generated by meeting those two men in the dark; is that right?

JUROR: Yes, sir.

THE COURT: This note is resentment against the jurors, but it doesn't effect [sic] the fact that you were motavated [sic] by the fear generated by those two men?

JUROR: Basically, yes, sir.

THE COURT: When you voted?

JUROR: Yes, sir.

THE COURT: Could you be an impartial-render a fair and impartial verdict after having such fear generated by those two men?

THE JUROR: Up to a point. As I said up until I think Saturday I was--I was on course, really on course with my fellow jurors, up to that point. The turning point, taking place like Saturday evening, the turning point.

THE COURT: When did you vote, by the way?

JUROR: We voted yesterday.

THE COURT: Was it inspired by fear of any kind?

JUROR: Yes, your Honor.

THE COURT: That's the answer I think. We can't have fear of any type. You were fearful, is that the story? Is that the truth?

JUROR: It's the truth.

THE COURT: This note primarily related to what the jurors told you and you were not going to be persuaded or forced to vote against your belief and conscience.

JUROR: Yes, sir.

THE COURT: But you were nevertheless voting out of fear.

JUROR: Yes, sir.

* * * *

JUROR: I have a point I just want to get over it briefly. We have the highest regards and respect for you and what you have done throughout the trial, the patience. That is what puzzles me. That has been a mystery to me.

I felt like when you asked me the question this morning, if you had in mind if it was a physical threat or a promisory [sic]-that a threat was made. As I had-in itself the fact that two complete strangers and the fact that they knew that I was on a particular trial.

THE COURT: It started something up here in your head to create fear, is that your story?

JUROR: Yes, sir, that is.

THE COURT: You see you can understand there is something that puzzled me between this note and what you said this morning. Now I understand it. It is fear.

JUROR: Yes, sir.

The reporter then read the voir dire to counsel in chambers. The government again moved that Juror No. 9 be excused for "good cause" pursuant to Fed.R.Crim.P. 23(b), and the defense renewed its motion for a mistrial. The court granted the government's motion. There was also discussion concerning the impact of the removal of

Juror No. 9 upon the other jurors. The government argued that any voir dire of the remaining jurors should be postponed until after the verdict, because any preverdict inquiry regarding that subject "could probably taint them even more and prevent a verdict by trying to discuss this." The court then said: "I think I ought to ask them whether they can render a fair and impartial verdict under the circumstances that arise from the dismissal of juror number nine." The defense responded: "I stand by the position that a mistrial be granted." The defense immediately thereafter asked the court "to instruct the remaining eleven jurors that they must begin their deliberations all over again from scratch."

Judge Bartels then called the remaining eleven jurors into the courtroom and gave them the following instruction:

> Members of the jury, for reasons with which you are not concerned juror number nine has been dismissed, which should in no way affect your further deliberations.
>
> Consequently the remaining jurors are requested to go back to the jury room and carefully reexamine all the evidence from the beginning and any conclusion [sic] that have been reached so that they can reach a true and impartial and fair verdict, one way or the other, without bias or sympathy and without considering the dismissal of jury [sic] number nine.

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When the jury retired, defense counsel contended unsuccessfully that Judge Bartels had reneged upon a commitment to conduct a poll of the remaining jurors regarding their continuing ability to render a fair verdict. Approximately ten minutes later, the jury reported that it had reached a decision. The judge called the jury back into the courtroom and gave them the following additional instruction:

> I have a note here that says the jury has reached a decision. I don't want to know what that decision is. I don't think you have had time enough to deliberate by yourself [sic] independently after I dismissed jury [sic] number nine.
>
> I'm going to ask you again to go over some of that evidence carefully and lay aside anything that you might have heard from juror number nine, because it is necessary that you do deliberate as an independent jury, independent of juror number nine.
>
> Please be kind enough to go back again and do some deliberation as I have suggested that you do.

Shortly thereafter, the jury requested, and was provided with, new verdict forms.

Three hours later, at approximately 8:30 p.m., the jury sent out a note which said: "We have thoroughly considered all of the evidence in this case and have reached a unanimous decision." The jury then reported a verdict of guilty on all counts.

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Following the receipt of the verdict, the court thanked the jurors for their "outstanding devotion as citizens to your important work as jurors." At the instance of the government, the jurors were then asked the following questions:

1. Was your verdict based upon the evidence and no other reason?

2 [D]id anything that juror number nine say [sic] to you during deliberation affect your verdict in any way?

3. Did juror number nine's dismissal affect your verdict in any way?;

The jurors individually and unanimously responded affirmatively to the first question, and negatively to the others.

The government then moved to remand Gotti and Carneglia, and a three-day hearing was held regarding that motion. During that hearing, the FBI "case agent," William C. Noon, was examined in open court concerning conversations with two confidential sources and with four FBI agents who were each the contact agent for an additional confidential source, and Judge Bartels examined the latter four agents *in camera*. Tape transcripts were also introduced in evidence. The court determined that Gotti and Carneglia both posed a risk of flight and a danger to the community, and ordered that they be remanded. The information adduced at the bail hearing was then utilized

at the subsequent sentencing proceeding, at which the sentences hereinabove described were imposed.

This appeal followed. Further factual matters are set forth hereinafter in connection with the issues to which they relate.

Discussion

Appellants raise the following five issues on appeal: (a) whether the district court acted properly in handling problems which arose during jury deliberations; (b) whether the district court correctly held that surveillance agents complied with the minimization requirements of the eavesdropping orders; (c) whether the district court admitted the wiretap evidence without adequate authentication; (d) whether the district court properly admitted expert testimony; and (e) whether during sentencing the district court improperly relied upon hearsay evidence of appellants' continued narcotics trafficking and ties to organized crime.

A. *Jury Deliberations.*

Appellants' main claim on appeal is "that the trial court's handling of the jury deliberations was erroneous in several respects." They contend that the two *Allen* charges to the jury were unduly coercive, that Juror No. 9 was improperly dismissed, and that the district court further erred by failing to conduct an individual, in camera voir dire of the remaining jurors following the dismissal of Juror No. 9. The government responds that "the rulings of

which the defendants complain rest upon factual findings and discretionary determinations that the district court was uniquely qualified to make," and accordingly that "defendants simply cannot satisfy the heavy burden required to disturb those rulings on appeal." In reviewing these claims, we recognize that jury deliberations represent a "critical stage of a criminal trial." *United States v. Ronder*, 639 F.2d 931, 934 (2d Cir. 1981) (citing *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946)).

1. *The Allen Charges.*

Turning first to the question of the *Allen* charges, we note that this circuit "has consistently reaffirmed its approval of the supplementary charge to encourage a verdict in the face of an apparent deadlock." *United States v. Hynes*, 424 F.2d 754, 757 (2d Cir.) (citing *United States v. Barash*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969); *United States v. Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969); *United States v. Rao*, 394 F.2d 354 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968); *United States v. Bilotti*, 380 F.2d 649 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966)), *cert. denied*, 399 U.S. 933 (1970). "The propriety of an *Allen*-type charge depends on whether it tends to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts." *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (in banc) (citing *United States v. Green*, 523 F.2d 229, 236 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976)), *cert. denied*, 435 U.S. 905 (1978).

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Appellants contend that the *Allen* charges in this case were improperly coercive, noting especially that two such charges were given. They also assert that the district court erred in refusing to let defense counsel review and comment upon the initial charge before it was delivered to the jury, despite an explicit request by counsel that this be done.

We note first that the initial *Allen* charge responded to a jury note indicating that a juror refused to vote, rather than that one or more votes had resulted in a jury deadlock (the usual situation calling for an *Allen* charge).[5] *Cf. United States v. Roman*, 870 F.2d 65, 77 (2d Cir.) (follow-up instruction the "first real *Allen* charge, since the court's response to the jury's prior note was merely a clarification of the jurors' individual responsibilities without an exhortation that they reach a decision"), *cert. denied*, 109 S. Ct. 3164 (1989). In any event, we do not regard a repeated *Allen* charge as inevitably coercive. *See id.; United States v. O'Connor*, 580 F.2d 38, 44 (2d Cir. 1978); *Robinson*, 460 F.2d at 517-18. In this case, moreover, the district court included in both instructions the sort of cautionary language counselling jurors not to surrender any conscientiously held views that we have usually deemed to negate coercion. *See, e.g., United States v. Burke*, 700 F.2d 70, 80 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983); *United States v. Valencia*, 645 F.2d 1158, 1167 (2d Cir. 1980); *United States v. Brown*, 582 F.2d 197,

5. Indeed, no deadlock was reported to the court prior to the second *Allen* charge. See *supra* note 4.

202 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978); *Robinson*, 560 F.2d at 517.

Most fundamentally, however, it is clear at least with the aid of hindsight that the single juror who was holding out against a guilty verdict was Juror No. 9, who was ultimately dismissed before the jury returned its verdict. Accordingly, any coercive impact of the *Allen* charges upon that juror was indisputably rendered irrelevant, and accordingly unprejudicial, by his dismissal from the jury panel. If he was improperly discharged, of course, or if the jury's subsequent deliberations were prejudicially compromised, independent grounds for reversal would result. On the facts presented here, however, we see no basis to conclude that the giving of the two *Allen* instructions constituted reversible error.

Similarly, the court's refusal to allow defense counsel to review and comment upon the initial *Allen* instructions was inappropriate, see *United States v. DiLapi*, 651 F.2d 140, 145 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982); *Ronder*, 639 F.2d at 934, but no prejudice resulted. *See DiLapi*, 651 F.2d at 146; *United States v. Turbide*, 558 F.2d 1053, 1063-64 (2d Cir.), *cert. denied*, 434 U.S. 934 (1977); *Robinson*, 560 F.2d at 516-17.

2. *The Dismissal of Juror No. 9.*

Appellants contend that the district court improperly dismissed Juror No. 9, and should instead have urged him to set aside his apprehensions and continue to deliberate.

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The district court followed the procedure which we outlined in *United States v. Aiello*, 771 F.2d 621, 629 (2d Cir. 1985):

> Upon learning of an unauthorized communication by a third person with a juror about a case pending before the juror, the judge must investigate the matter to determine whether the juror's ability to perform her duty impartially has been adversely affected. The extent of that investigation and the method of conducting it will, of course, depend on the surrounding circumstances, including the content of the communication and the apparent sensitivity of the juror. The trial court must be given wide discretion to decide upon the appropriate course to take, in view of his personal observations of the jurors and the parties.

Fed. R. Crim P. 23(b) provides that "if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." "Whether in the circumstances 'just cause' exists to excuse a juror is a matter within the discretion of the district court." *United States v. Casamento*, 887 F.2d 1141, 1187 (2d Cir. 1989) (citing *United States v. Stratton*, 779 F.2d 820, 832 (2d Cir. 1985), *cert denied*, 476 U.S. 1162 (1986)), *cert. denied*, 110 S. Ct. 1138, 2175, 2564 (1990).

We see no basis for overturning the district court's exercise of discretion in dismissing Juror No. 9. Judge Bartels conducted two extensive interviews of the juror to

probe his mental state in the aftermath of the disturbing encounter in his driveway the night before the jury's deliberations began. The juror expressed a continuing state of fearfulness, told the judge that he had broken down in the course of apprising his fellow jurors of his situation, and had at one juncture refused to render any vote at all on the counts of the indictment. Given these facts and the attendant circumstances recited earlier herein, we would be rash indeed to second guess the conclusion of the experienced trial judge, based in large measure upon personal observations that cannot be captured on a paper record, that Juror No. 9 was disabled by fear from continuing to participate in the jury's deliberations.

3. *Postdismissal Deliberations by Remaining Jurors.*

Appellants press most strongly their claim that the district court erred in its handling of the jury deliberations that occurred after Juror No. 9 was dismissed. Initially, they contend that despite the discretion vested in the district court by Fed. R. Crim. P. 23(b), a mistrial should have been declared when the juror was dismissed because he had apprised his fellow jurors (prior to informing the court) concerning the incident in his driveway, thereby fatally infecting their capacity to deliberate and render a proper verdict. In any event, appellants argue, it was reversible error to allow the trial to proceed without conducting an inquiry of the remaining jurors, immediately following the dismissal of Juror No. 9, as to any impact his dismissal and the attendant events might have had upon the jury's deliberations.

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We disagree. Rule 23(b) certainly vested the district court with adequate discretion to determine that this third trial of the charges against Gotti and Carneglia should proceed to a verdict by the remaining jurors. Further, decisions as to when to question jurors and the manner of that inquiry are generally left to the trial judge's broad discretion. *See, e.g., United States v. Chang An-Lo*, 851 F.2d 547, 558 (2d Cir.), *cert. denied*, 488 U.S. 966 (1988); *United States v. Calbas*, 821 F.2d 887, 896 (2d Cir. 1987), *cert. denied*, 485 U.S. 937 (1988); *Aiello*, 771 F.2d at 629; *United States v. Hillard*, 701 F.2d 1052, 1064 (2d Cir;), *cert. denied*, 461 U.S. 958 (1983); *United States v. Phillips*, 664 F.2d 971, 998-1000 (5th Cir. Unit B Dec. 1981), *cert. denied*, 457 U.S. 1136, 459 U.S. 906 (1982). We note, moreover, that "if the members of the jury are questioned in depth about a possible jury tampering incident, they may become so prejudiced that the accused cannot obtain a fair trial." *United States v. Moten*, 582 F.2d 654, 661 (2d Cir. 1978).

In the colloquy between the trial judge and counsel following the final interview of Juror No. 9, the government pressed the view that Juror No. 9 should be dismissed and the case left with the remaining jurors, pursuant to Fed. R. Crim. P. 23(b), and that any voir dire of the remaining jurors should be postponed until after the verdict, citing *Moten*. The following colloquy then ensued:

MR. FISCHETTI (counsel to Gotti): The point is with that, and I'm familiar with Motten [sic], although I haven't read it recently. The point Mr. Shargel and I are making is *there is no need at this point to conduct an inquiry of the jury before or after a verdict,* since we already know from this jurors [sic] statements to your Honor, that he has already discussed this problem, this per se alleged implied threat, this already has been going on. This has already infected the jury.

Now one way or the other, if your Honor does not declare a mistrial, as we asked for and we do-the juror is discharged and we get a verdict, one way or another, I think both sides can argue from this record it's very very clear that this jury has been affected by a member [sic] of extraneous forces. I'm laying aside the fact that we say he was coerced in the jury room. But there is no doubt that the jury knows-

THE COURT: They know about it. So what?

MR. FISCHETTI: *There is no need to conduct an inquiry.*

THE COURT: *I think I ought to ask them whether they can render a fair and impartial verdict under the circumstances that arise from the dismissal of juror number nine.*

MR. SHARGEL (counsel to Carneglia): Isn't the position then that one of their members has been threatened, that's-

MR. LA RUSSO (government counsel): They're staying [sic] he perceived it as a threat.

MR. SHARGEL: *I stand by the position that a mistrial be granted.*

Emphasis added.

The discussion continued. Judge Bartels granted the government's motion, and said twice that he did not intend to voir dire the jury, whereupon Mr. Fischetti stated: "My motion is to instruct the remaining eleven jurors that they must begin their deliberations all over again from scratch." He twice reiterated this position, concluding: "That's our motion."

The district court then advised the jury that Juror No. 9 had been dismissed, "which should in no way affect your further deliberations," and instructed them to "carefully re-examine all the evidence from the beginning" and any previous conclusions reached, "without considering the dismissal" of Juror No. 9. When the jury was ready ten minutes later with a verdict, the court refused to accept

it, instructing the jury of the necessity "that you do deliberate as an independent jury, independent of juror number nine." The jury then requested new verdict forms, deliberated three more hours, reported their verdict, and, responding to a post-verdict inquiry, individually and unanimously asserted that neither anything said by Juror No. 9 nor his dismissal had influenced their verdict.

Appellants contend here, as they did below, that the district court reneged upon a commitment to "ask the jurors whether they can render a fair and impartial verdict under the circumstances that arise from the dismissal of juror number nine." In our view, this is not a fair reading of the record. At one point during the pertinent colloquy, it is true, Judge Bartels stated his intention as quoted above. This comment followed, however, two explicit statements by defense counsel that no inquiry was needed. Defense counsel responded to Judge Bartel's comment, furthermore, by insisting that a mistrial should be declared. When the court granted the government's motion and did not declare a mistrial, defense counsel then stated three times that the jury should begin its deliberations "from scratch," concluding: "That's our motion." In the course of that colloquy, the trial judge stated twice that he did not intend to conduct a voir dire at that juncture, eliciting no objection from defense counsel.

In accordance with defense counsels' request, the jury was then instructed to "carefully re-examine all the evidence from the beginning and any conclusion [sic] that have been reached," and also enjoined to disregard the dismissal of Juror No. 9. Only after that instruction had

been given and the jury had resumed its deliberations did defense counsel belatedly insist upon the preverdict inquiry for which they now contend. Consistent with the instruction, the court refused to accept a subsequent verdict from the jury that it deemed premature. Finally, as suggested by the government, the jury was polled after the rendition of its verdict regarding any impact of the situation regarding Juror No. 9 upon its deliberations.

We discern no error in the district court's handling of this difficult situation. There were pros and cons, as *Moten* indicates, to an interruption of the jury's deliberations to conduct an inquiry regarding the impact of the events regarding Juror No. 9. Equally important, appellants did not seek that relief, and the trial judge provided, in substance, the instruction which the defense requested.

Finally, we perceive no guidance for our resolution of this issue in *United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989). We reversed and remanded for a new trial in *Hernandez* because we could "not be confident that [a removed juror's] disagreement with his colleagues was not the cause of his removal." 862 F.2d at 23. We noted that if the juror was excusable for mental incompetence, dismissal should have occurred considerably earlier in the jury's deliberations. *Id.* Here, by contrast, the record is clear that Juror No. 9 was dismissed because the district court determined, on more than ample evidence, that the juror had been intimidated. Further, the dismissal followed promptly upon the court's

conclusion that intimidation had occurred and was affecting the juror's deliberations.

B. *Minimization of Electronic Interceptions.*

Appellants claim that the electronic interceptions within Ruggiero's home violated both the statutory requirement that any interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception" under pertinent federal law, 18 U.S.C. § 2518(5) (1988), and various provisions of the orders authorizing the interceptions.

These contentions were exhaustively considered and rejected by Judge Costantino, prior to the first trial of this case, in an evidentiary hearing conducted over a total of nineteen days and in a seventy-page opinion. They were also the subject of an adverse ruling by Judge McLaughlin when appellants renewed their suppression motion after the case was reassigned to him. We see no basis to overturn these carefully considered determinations.

Even if we did, furthermore, Gotti and Carneglia had no expectation of privacy in Ruggiero's home and telephone that would provide a basis for them to seek suppression of this evidence. 18 U.S.C. § 2518(10)(a)(i) and (iii) (1988) provides that "[a]ny aggrieved person" may move to suppress wiretap evidence when "the communication was unlawfully intercepted" or "the interception was not made in conformity with the order of authorization." As we reiterated, however, in *United States v. Gallo*, 863

F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989), a case involving the same electronic interceptions at Ruggiero's home that are challenged here, this provision "is to be construed in accordance with standing requirements usually applied to suppression claims under the fourth amendment." *Id.* at 192 (citing *Alderman v. United States*, 394 U.S. 165, 175-76 & n.9; S. Rep. No. 1097, 90th Cong, 2d Sess. 12, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2179-80); *see also United States v. Fury*, 554 F.2d 522, 526 (2d Cir.), *cert. denied*, 433 U.S. 910 (1977), 436 U.S. 931 (1978).

Gotti and Carneglia contend that because we noted, in *Gallo*, that the complaining defendants in that case were "not named as targets of the surveillance," 863 F.2d at 192, whereas Gotti and Carneglia were so named, *Gallo* somehow confers standing upon Gotti and Carneglia vis-a-vis Ruggiero's home and telephone. *Gallo*, however, while mentioning the nontarget status of the defendants in that case, did not invest that fact with any particular significance, much less the decisive force for which appellants contend. We note that in *United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1977), we concluded that it was doubtful that defendants had standing to raise a minimization challenge to wiretaps on phones not in their residences, *see id.* at 1011 n.13, even though many of the challenging defendants were named targets of the wiretap orders, *see id.* at 1010.

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C. *Authentication of Tape Recordings.*

Gotti and Carneglia contend that the tape recordings of telephonic and other conversations occurring in Ruggiero's house were inadequately authenticated, in violation of Fed.R.Evid. 901(a), and therefore should not have been admitted in evidence. We agree, however, with the contrary rulings of Judges Costantino, McLaughlin, and Bartels on this issue.

Rule 901(a) requires the proponent of any evidence to submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is satisfied "if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." 5. J. Weinstein & M. Berger, Weinstein's Evidence Para. 901(a)[01], at 901-17 (1990). Recognizing, however, that "recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration, we have adopted a general standard, namely, that the government 'produce clear and convincing evidence of authenticity and accuracy' as a foundation for the admission of such recordings." *United States v. Fuentes*, 563 F.2d 527, 532 (2d Cir.) (quoting *United States v. Knohl*, 379 F.2d 427, 440 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967)), *cert. denied*, 434 U.S. 959 (1977). Finally, we review rulings as to authentication for abuse of the district court's "broad discretion." *See United States v. Mendel*, 746 F.2d 155, 167 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *United States v. Craig*, 573 F.2d 455, 478-79 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

Applying these standards, we find no basis for reversal in appellants' contention that the chain of FBI custody was not adequately established with respect to the Ruggiero tape recordings. Appellants concede compliance with the statutory sealing requirement, see 18 U.S.C. § 2518(8)(a) (1988); and they do not claim any specific instance of tampering or suspected tampering. Their contentions go to the weight, rather than admissibility, of this evidence, and thus provide no basis for appellate reversal.

D. *Expert Testimony.*

Gotti and Carneglia contend that the district court committed reversible error in allowing certain testimony by a government expert witness, Gerald Franciosa of the United States Drug Enforcement Agency. Franciosa had been engaged for sixteen years in carrying out and supervising narcotics-related investigations, and gave testimony concerning the meaning of certain of the recorded conversations that had been introduced in evidence. Appellants' central contention, which they support with references to various specific testimony provided by Franciosa, is that he provided the jury with conclusions and interpretations regarding the recorded conversations, rather than with permissible testimony concerning narcotics jargon and practices.

A trial court may admit expert testimony if it finds that such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. "It is well settled that the decision whether to admit expert testimony under Fed. R. Evid.

702 is vested in the broad discretion of the trial court, and that decision will be sustained unless manifestly erroneous." *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir.) (citing *United States v. Cruz*, 797 F.2d 90, 96 (2d Cir. 1986)), *cert. denied*, 484 U.S. 957, 958 (1987), 1061 (1988). Courts have consistently recognized, moreover, that "the operations of narcotics dealers are a proper subject for expert testimony under Fed. R. Evid. 702." *Id.* (citing *Cruz*, 797 F.2d at 96); *see also United States v. Diaz*, 878 F.2d 608, 616-17 (2d Cir.) (quoting *Nersesian*, 824 F.2d at 1308), *cert. denied*, 110 S. Ct. 543 (1989); *United States v. Carmona*, 858 F.2d 66, 69 (2d Cir. 1988); *United States v. Kusek*, 844 F.2d 942, 949 (2d Cir.), *cert. denied*, 488 U.S. 860 (1988); *United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986).

Some of our opinions can be read as drawing into question expert testimony in drug cases that included conclusions and interpretations. *See, e.g., United States v. Mang Sun Wong*, 884 F.2d 1537, 1543-44 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1140 (1990); *United States v. Tutino*, 883 F.2d 1125, 1134 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1139 (1990); *Nersesian*, 824 F.2d at 1308; *United States v. Brown*, 776 F.2d 397, 400-01 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); *United States v. Young*, 745 F.2d 733, 765-66 (2d Cir. 1984) (Newman, J, concurring), *cert. denied*, 470 U.S. 1084 (1985). None of these cases, however, ruled that the admission of such expert testimony constituted error. Furthermore, Fed. R. Evid. 704 (a) provides, with an exception not pertinent here, that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it

embraces an ultimate issue to be decided by the trier of fact."

In *United States v. Scop*, 846 F.2d 135 (2d Cir.), *rev'd in part on rehearing*, 856 F.2d 5 (2d Cir. 1988), we reviewed and synthesized a number of our rulings in this area, taking into account also rule 704 (a) and the advisory note thereto, concluding:

> In each of these cases [*United States v. Brown, supra; United States v. Young, supra; United States v. Carson*, 702 F.2d 351 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983)], we upheld the convictions. We noted in *Brown*, however, that "there is something rather offensive in allowing an investigating officer to testify not simply that a certain pattern of conduct is often found in narcotics cases, leaving it for the jury to determine whether the defendant's conduct fits the pattern, but also that such conduct fitted the pattern." *Id.* at 401. Nevertheless, the Advisory Committee's Note to Rule 704 cautions against limiting experts to "might or could" formulations when they are prepared to say "did," and *Carson, Young* and *Brown* appear to be consistent with that admonition. Whether these results are desirable is not for us to say in light of the Rules' generally liberated approach to expert testimony.
>
> None of our prior cases, however, has allowed testimony similar to Whitten's repeated use of statutory and regulatory language indicating guilt. For example, telling the jury that a defendant acted as a

> "steerer" or participated in a narcotics transaction differs from opining that the defendant "possessed narcotics, to wit, heroin, with the intent to sell," or "aided and abetted the possession of heroin with intent to sell," the functional equivalent of Whitten's testimony in a drug case. *It is precisely this distinction, between ultimate factual conclusions that are dispositive of particular issues if believed, e.g., medical causation, and "inadequately explored legal criteria," that is drawn by the Advisory Committee's Note.*

Scop, 846 F.2d at 141-42 (emphasis added); *see also United States v. Bilzerian*, No. 89-1502, slip op. 7561, 7576 (2d Cir. Jan. 3, 1991) ("[*Scop* and *Marx & Co. v. Diner's Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977)] establish that although an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts."); *Diaz*, 878 F.2d at 617-18 (quoting *Scop*, 846 F.2d at 141-42).

Measured against these standards, we cannot accept appellant's contention that it was reversible error to allow Franciosa to testify to conclusions and interpretations, and we do not perceive any other basis to conclude that the district court abused its discretion in this regard. The challenged testimony by Franciosa typically interpreted or characterized tape-record conversations, but did not even arguably attempt to do so in terms of the applicable legal criteria. In addition, we note that the trial judge instructed the jury that it:

> should not . . . accept [Franciosa's] testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment and common sense.
>
> The determination of the facts in this case rest [sic] solely with you. And it's up to you to determine to what extent you want to give such weight as you desire to the testimony of an expert witness.

E. *Sentencing.*

As indicated hereinabove, the district court conducted a posttrial hearing to determine whether Gotti and Carneglia should be remanded without bail prior to sentencing, and the information adduced at that hearing was taken into account at their subsequent sentencing. The FBI "case agent," William C. Noon, was examined in open court regarding information he had obtained directly from two confidential sources, and from four other FBI agents who were each the contact agent for an additional confidential source, regarding the continuing involvement of Gotti and Carneglia in narcotics trafficking and organized crime. Numerous tape transcripts were also introduced in evidence.

Gotti and Carneglia concede that hearsay evidence may be used in sentencing, *see United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), but contend that this procedure violated their due process rights because the hearsay information was challenged and not corroborated, *see Carmona*, 873 F.2d at 574; *Fatico*, 579 F.2d at 713.

They also argue that the government did not prove the disputed allegations by a preponderance of the evidence, as required by *United States v. Lee*, 818 F.2d 1052, 1056 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987). We see no merit in these claims.

In its opinion remanding Gotti and Carneglia after the posttrial bail hearing, the district court stated:

> At this *in camera* proceeding, which the court conducted to eliminate one level of hearsay, the agents' testimony matched Noon's testimony.
>
> Furthermore, the agents each independently affirmed to the court that over the course of many years they had found informants A through D to be reliable sources, having been corroborated by subsequent investigations, surveillances, Title III wire taps, and searches. The agents also indicated that the information provided by A, B, C and D [the informants], was further corroborated by information received from other agents and other informants. In short, the testimony of Noon, and in turn that of the FBI agents questioned *in camera*, was based on interlocking, corroborated sources whose long-term reliability was established. *See Gaviria*, No. 88-1232 [*United States v. Carmona*, 873 F.2d 569 (2d Cir. 1989)], slip op. at 2855 (where interlocking and meshing hearsay testimony was properly considered *in sentencing*). Thus, the hearsay evidence presented in Noon's testimony had the requisite indicia of reliability and the Court accepts it, along with the rest of Noon's

testimony, as credible. The fact that the testimony of Noon and of the other agents was of a general nature and lacked specifics was necessary to protect the informants from retaliation.

In addition, various of the tape transcripts introduced at the remand hearing corroborated the continuing involvement of Gotti and Carneglia in both organized crime and narcotics trafficking. Accordingly, the requirements of both corroboration and proof by a preponderance of the evidence regarding these matters were amply satisfied.

This being so, the sentencing court in this pre-Guidelines case had "wide discretion in imposing sentence, and, if a sentence is within the permissible statutory limits and it does not appear that the court took into account any improper factor, the sentence may not be reviewed on appeal." *United States v. Giraldo*, 822 F.2d 205, 210 (2d Cir.) (citing *Gore v. United States*, 357 U.S. 386, 393 (1958); *United States v. Mejias*, 552 F.2d 435, 447 (2d Cir.), *cert. denied*, 434 U.S. 847 (1977); *United States v. Hendrix*, 505 F.2d 1233, 1235 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975)), *cert. denied*, 484 U.S. 969 (1987). There is thus no basis for disturbing the sentences imposed upon Gotti and Carneglia.

Conclusion

The judgments of conviction are affirmed.

Appendix B
Order of United States Court of Appeals
on Petition for Rehearing
and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Fourteenth day of May, one thousand nine hundred and ninety one.

FILED: May 14, 1991

DOCKET NUMBERS 89-1354; 89-1355

UNITED STATES OF AMERICA,
Appellee,

v.

ANGELO RUGGIERO, ET AL.,
Defendants,

GENE GOTTI and JOHN CARNEGLIA,
Defendants-Appellants.

Appendix B
Order of United States Court of Appeals
on Petition for Rehearing
and Suggestion for Rehearing In Banc

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants Gene Gotti and John Carneglia,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/_____
ELAINE B. GOLDSMITH
Clerk

Appendix C
United States District Court's Finding of Fact

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

GENE GOTTI and JOHN CARNEGLIA,
Defendants.

FILED May 27, 1989

83-CR-412(s)(JRB)

THE COURT'S FINDINGS OF FACT
RE: DISMISSAL OF JUROR NO. 9

The following constitute the facts leading up to, and the reasons behind, the Court's decision to dismiss one juror in the above-captioned case and proceed with an eleven-member jury:

On Tuesday, May 16, 1989, counsel presented their summations to the jury which was anonymous as to name and residence. Assistant United States Attorney Robert

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LaRusso went first, followed by Carneglia's attorney, Gerald Shargel. After Shargel was finished, the Court recessed for lunch at 1:50 p.m.

At 2:50 p.m., all counsel met with the Court in chambers at the request of the Government. LaRusso stated that his office had received a telephone call from an attorney out on Long Island named Wexler who had said that a resident of Kings Park, Long Island, a Walter Arnold, had received an anonymous note. As LaRusso later ascertained (*see* Transcript ["T"] 3533-3534) the anonymous note stated:

> Walter Arnold
> 84 Broadview Ave
> Kings Park, LI NY
>
> Dear Mr. Arnold:
>
> I am writing this letter as a concerned neighbor and friend.
> It has come to my attention that you are a juror on the Gotti trial. Our neighbor who lives on the same block, Federal Agent William Noon is in charge of the Gotti investigation.
> As you know, Kings Park is a very small community. Our children go to the same schools, we shop in the same stores.
> It seems improper that you be on the same jury where the head FBI agent in charge is your neighbor.

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> In all conscience you should bring this matter to the attention of the judge, goverment [sic] and the court. I know you will do the right thing.
>
> A Concerned Neighbor and Friend

While William Noon was the FBI case agent assigned to the Gotti case, and testified extensively at trial, Wexler informed LaRusso that Arnold was not a juror on any case, but Arnold's *neighbor*, whose name was not mentioned, was currently sitting as a juror in the Gotti trial.

As there were four remaining alternate jurors, the Court tentatively decided that if a juror was Noon's neighbor it would be preferable to remove him or her without further inquiry rather than throw a cloud over the trial at such a critical juncture. (T 3461-3465)

Thereafter, Gotti's attorney, Ronald Fischetti, presented his summation and Assistant United States Attorney Ephraim Savitt delivered the Government's rebuttal. The jury members were dismissed for the evening, and, as had been the case throughout the trial, were transported to their respective homes by deputy United States marshals. After the jurors were dismissed for the day, counsel met with the Court at sidebar and were informed by the Court that it had ascertained that Juror No. 9 lived in Kings Park and was indeed Arnold's neighbor. The Court decided, after conferring with counsel, that Juro No. 9 would be dismissed, and the

marshals were accordingly instructed not to pick up Juror No. 9 the next morning. (T 3501; 3532-3537).

As Alternate No. 1, a Mr. Edwards, would later relate to the Court, after he was dropped off at home by the marshals that very evening he attended church. When Mr. Edwards returned home from church at approximately 10:45 p.m., he got out of his car and opened his garage door. When he turned around, two strangers were standing in front of him -- a black man, and a white man, both approximately six feet tall. The black man addressed Mr. Edwards, saying something to this effect: "Good evening Mr. Edwards. You are on jury duty, the trial going on now, the big trial, the Gotti case." (T 3900; 3901-02) Mr. Edwards made a noncommittal response, "Hum, hum," and the two men turned and walked away. (T 3900; 3902; 3908)

The next day, Wednesday, May 17, 1989, Mr. Edwards as Alternate Juror No. 1 was substituted for Juror No. 9. The Court delivered its charge to the jury, the remaining alternate jurors were discharged, and the jury began its deliberations. The Court gave the jury copies of the indictment and, upon the jury's request, copies of the Court's charge. The jury was also given agreed-upon verdict forms. The Court then ordered that the jury be sequestered.

For the next few days -- Thursday, Friday, Saturday, and Sunday -- the jury continued its deliberations without

event, occasionally requesting certain exhibits, the replaying of tape recordings that had been played at trial, and the readback of some testimony.

Around noon on Monday, May 22, 1989, the Court received the following note from the jury:

> One juror refuses to vote, are there any guidelines to help us.

The jury was brought into the courtroom, and the Court delivered the instruction which is set out in full in the margin.[1] The jury was then returned to the jury room.

---

1. Well, ladies and gentlemen of the jury, as you are aware, in order to return a verdict in this case, each juror must agree thereto. In other words, your verdict must be unanimous.

   You should, therefore, consider this case, and deliberate upon it, and reach a verdict without fear or sympathy. You must remember at all times that the Government has the burden of proof beyond a reasonable doubt.

   Now, the jury in this case was selected carefully. When you filled out the juror questionnaire, and again when you were interviewed, each of you was asked, "Is there any reason why you could not render a fair and impartial verdict in this case?" Each of you said, "No." All jurors took an oath when the panel was picked in this case that they would try this case "and a true verdict render according to the evidence and the law." So then, every juror swore to render a verdict. To render a verdict each juror must vote, one way or the other.

   The Court is not interested which way you vote and reminds you that no juror should surrender his or her honest conviction as to the weight or effect of the evidence for the sole purpose of determining a verdict; and a juror should not

(footnote continued on following page)

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United States District Court's Finding of Fact

A few hours later, the Court received the following note from the jury:

> While attempting to reach a decision concerning the innocence or guilt of the defendants, a juror refuses to discuss the case at all.

After consulting with counsel in chambers, the Court instructed a deputy marshal to ascertain from the jury foreman which juror was being referred to in the notes and to bring that juror into chambers. The marshal returned with the new Juror No. 9, Mr. Edwards, who was then interviewed by the Court in the presence of counsel. Juror No. 9 indicated that he and all the other jurors had voted after the Court's instruction, and said that he was discussing the case "in my own way with them." (T 3848) The juror also said that, although he had voted, he felt that his fellow jurors were trying to persuade him "to vote one way or the other." (T 3848) Juror No. 9 was sent back to the jury room.

(footnote continued from previous page)

> hesitate to reexamine his own views and change his opinion if convinced it is erroneous. But he should vote.
>
> The Court is not interested in who the juror is who has not yet voted and is not interested in the way the other jurors have voted or not voted. The matter is completely open.
>
> No juror should in any way feel coerced by my comments.

(T 3830-31)

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Subsequently, the entire jury was called into the courtroom, and the Court delivered a modified *Allen* charge.[2] Based on the interview with Juror No. 9, the Court was reasonably certain the jury was deadlocked.

---

2. I have received notice that the juror who you mentioned in your last memorandum has discussed the case and has voted.

I have also received notice that you are deadlocked and I am going to ask you to try once more. This case has been on trial for over five-and-a-half weeks and the jury has been sequestered for approximately five-and-a-half days. I do not believe that the case can be submitted to twelve men and women who are more intelligent or competent to decide it.

In order to return a verdict in this case, each juror must agree thereto. In other words, your verdict must be unanimous if it is to be a verdict. However, you only have to vote, but you do not have to agree. You do not have to bring in a verdict on all counts.

In your deliberations jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Although each juror must decide the case for himself, this should only be done after an impartial consideration of the evidence with his fellow jurors.

In the course of your deliberations a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous. Each juror who finds himself to be in the minority should reconsider his views in the light of the opinion of the jurors of the majority. Conversely, each juror should surrender his honest conviction as to the weight or effect of the evidence for his fellow jurors or for the purpose of determining a verdict.

But remember also that after full deliberation and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

(footnote continued on following page)

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The jury returned to the jury room and sent two notes to the Court. The first read:

> The jury will stay late this evening and try to work things out.

The second stated:

> A juror requests a private conference with Judge Bartels.

The Court called the jury into the courtroom and told them that, if anyone wanted to ask the Court questions, they could do so in writing.

The Court then received another note from the jury stating:

> The same juror who met with the judge before would like to meet again with the judge (and the attorney's[3] if necessary) to clarify his earlier remarks.

(footnote continued from preceding page)

> I will ask you to retire and resume your deliberations for such time that in your conscientious judgment seems reasonable with the hope that you can conscientiously reach an agreement.

(T 3854-56)

3. All notes from the jury are set out as written.

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The Court sent word to the jury room that Juror No. 9 should put his message to the Court in writing, and received the following note in response which was marked as Court Exhibit 46:

5/22/89

Att Judge Bartels:

There are two point I would like to address to you. No. (1) There were talk in the juror room concerning the fact that I could (go) to jail. And what would happen to my family left behind. Tollerence, and patience is not prevailing in the juror room. No (2) I strongly feel that my residence is known and is very concerned for my family. I simply can't be persuated or forced to vote against my belief and conscience.

Yours Truly
Juror #9

After consulting with counsel, the Court interviewed Juror No. 9 once more, again with counsel present. The Court first assured Juror No. 9 that there was no possibility of him going to jail (T 3873), and then told Juror No. 9, "I do want to know, however, whether you--I'm not interested in which way you voted. I want to know whether you voted one way or another and they [the jury] have a record of it." (T 3873) The juror indicated that he had voted, everyone had voted. (T 3873) Not yet apprised of the fact that Juror No. 9 had been approached by the two men on Tuesday night, the Court assured the juror,

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"Juror number nine, I wish to tell you as far as we know no one knows your residence. You can go back and feel free on that." (T 3874-75) Juror No. 9 was escorted back to the jury room.

At approximately 7:30 p.m., the jury was called out into the courtroom. The Court asked the foreman whether all the jurors has voted. The foreman said everyone had voted and, although they had not reached a verdict, he thought they could reach a verdict "this evening or tomorrow." (T 3879) The jury asked for fifteen minutes of further deliberations, and thereafter sent out a note indicating they were ready to return to the hotel at which they were sequestered.

Early on in the next day's deliberations the Court received yet another note from the jury, Court Exhibit 51, which read:

> Over the course of the last seven days of deliberations, the jury has reached an informal, unanimous agreement as to the guilt of the defendants on the 4 counts involved in the indictment. However, due to the fears of one juror relating to alleged threats he received prior to deliberations, the jury is unable to reach a formal unanimous verdict on any of the 4 counts. It is the conclusion of the jury that this situation cannot and will not be resolved.

The Court ascertained that the juror referred to in the note was Juror No. 9 and, due to the fact that the

note mentioned "fears" and "threats," decided to interview Juror No. 9 privately with only law clerks and a court reporter present. The Court felt that a private interview was essential to achieve the maximum candor and comfort on the part of Juror No. 9 and therefore denied defense counsels' motion that they and their clients be present.

At approximately 1:00 p.m., Juror No. 9 was called into chambers and recounted the story of his being approached by the two men on Tuesday evening, the night before jury deliberations began. The juror told the Court that he had not told the Court about the incident because initially he was not afraid. The juror said that on Saturday evening, however, "for some reason or another it began to -- it began to come to me, began to dawn on me as to why were those particular individuals in my driveway." (T 3903) The juror maintained that before Saturday night, he had been "actively involved" in deliberations. (T 3902-03; *see also* 3948) Juror No. 9 explained to the Court that, although he "had questioned some of the testimony along the way," (T 3909-10) -- "wasn't one hundred percent sure" (T 3910) -- he voted the way he voted because of his fear. (T 3909) Fear motivated his vote "[n]ot completely, but there was some aspects of it but not completely." (T 3911) The juror said that that morning, just prior to telling all of this to the Court, he had also told his fellow jurors of the incident with the two men. (T 3906)

Juror No. 9 was then returned to the jury room. The court reporter immediately prepared a transcript of the Court's interview of the juror, and made it available

to counsel. At approximately 2:30 p.m., the Court conferred with counsel as to whether the Court should dismiss the juror under Fed. R. Crim. P. 23(b), or whether the Court should declare a mistrial. (T 3912-44)

Because the Court felt there was an ambiguity between Juror No. 9's note (which stated that he couldn't be "persuated or forced to vote against my belief and conscience,") and the juror's later statement (that his vote was influenced by fear of the two men), the Court recalled Juror No. 9 and again interviewed him privately in chambers, on the record, with law clerks present (T 3944-50):

> THE COURT: I want to settle this one way or the other and I just want to know clearly, because this [note -- i.e., Court Exhibit 46 --] sort of conflicts a little with the statement you made this morning. This note of yesterday.
>
> JUROR: That note was in reference to when they said--
>
> THE COURT: To what the jurors were doing to you?
>
> JUROR: That's right.
>
> If I didn't -- regardless of my conscience, if I didn't do what was right, whatever, there could be a grand jury investigation, and what could happen to

me. You realize you could go to jail. That was like jamming something down my throat if I didn't go a certain way.

THE COURT: Nevertheless, your vote was motavated [sic] by fear?

JUROR: Yes, sir.

THE COURT: Generated by meeting those two men in the dark; is that right?

JUROR: Yes, sir.

THE COURT: This note is resentment against the jurors, but it doesn't effect [sic] the fact that you were motavated [sic] by the fear generated by those two men?

JUROR: Basically, yes, sir.

THE COURT: When you voted?

JUROR: Yes, sir.

THE COURT: Could you be an impartial -- render a fair and impartial verdict after having such fear generated by those two men?

JUROR: Up to a point. As I said up until I think Saturday I was -- I was on course, really on course with my fellow jurors, up to that point. The turning

point, taking place like Saturday evening, the turning point.

THE COURT: When did you vote, by the way?

JUROR: We voted yesterday.

THE COURT: Was it inspired by fear of any kind?

JUROR: Yes, your Honor.

THE COURT: That's the answer I think. We can't have fear of any type. You were fearful, is that the story? Is that the truth?

JUROR: It's the truth.

THE COURT: This note primarily related to what the jurors told you and you were not going to be persuaded or forced to vote against your belief and conscience.

JUROR: Yes, sir.

THE COURT: But you were nevertheless voting out of fear.

JUROR: Yes, sir.

. . . .

I felt like when you asked me the question this morning, if you had in mind if it was a physical threat or a promisory -- that a threat was made. As

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I had -- in itself the fact that two complete strangers and the fact that they knew that I was on a particular trial.

THE COURT: It started something up here in your head to create fear, is that your story?

JUROR: Yes, sir, that is.

THE COURT: You see you can understand there is something that puzzled me between this note and what you said this morning. Now I understand it. It is fear.

JUROR: Yes, sir.

(T 3947-50)

Juror No. 9 was returned to the jury room, and counsel were called to chambers where the court reporter read back the Court's interview of the juror. After hearing argument, the Court granted the Government's motion that Juror No. 9 be dismissed under Fed. R. Crim. P. 23(b). Juror No. 9 was then removed from the jury room, and was dismissed.

After the third interview with the juror, the Court was uncertain as to whether the fear which caused Juror No. 9 hesitation in deliberating and voting was caused by meeting the two men in the dark on Tuesday, May, 16, 1989. The Court therefore wished to settle the matter clearly and accordingly held the final interview with Juror

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No. 9 to remove any ambiguity. As set out *supra*, at that interview the Court asked, "[Y]our vote was motavated [sic] by fear?"

JUROR: Yes, sir.

THE COURT: Generated by meeting those two men in the dark; is that right?

JUROR: Yes, sir.

(T 3947)

It thus became apparent to the Court that the fear motivating Juror No. 9's vote was the fear generated by meeting the two men, and that, since his vote was being motivated by fear, there was "just cause" for his dismissal.

Thereafter, the remaining eleven jurors were called back into the courtroom where the Court instructed them that

> for reasons with which you are not concerned juror number nine has been dismissed, which should in no way affect your further deliberations.
>
> Consequently the remaining jurors are requested to go back to the jury room and carefully reexamine all the evidence from the beginning and any conclusion[s] that have been reached so that they can reach a true and impartial and fair verdict, one

way or the other, without bias or sympathy and without considering the dismissal of juror number nine.

(T 3963)

The jury retired to the jury room and, approximately ten minutes later, sent out a note indicating that they had reached a decision. The jury was called back to the courtroom and the Court stated:

> I have a note here that says the jury has reached a decision. I don't want to know what that decision is. I don't think you have had time enough to deliberate by yourself independently after I dismissed juror number nine.
>
> I'm going to ask you to go over some of that evidence carefully and lay aside anything that you might have heard from juror number nine, because it is necessary that you do deliberate as an independent jury, independent of juror number nine.
>
> Please be kind enough to go back again and do some deliberation as I have suggested that you do.

(T 3969)

Shortly thereafter, the Court received a note from the jury which read:

> The jury requests verdict forms for use in deliberations.

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Eleven fresh verdict forms were provided to the jury.

Three hours later, at approximately 8:30 p.m., the Court received the final note from the jury:

> We have thoroughly considered all of the evidence in this case and have reached a unanimous decision.

The jury was called into the courtroom, the foreman delivered the verdict, which was guilty on all counts for both defendants, and the jurors were polled. Finally, the Court asked the jurors three questions: 1) Was your verdict based upon the evidence and no other reason? Each juror answered yes. 2) Did anything that Juror No. 9 say to you during deliberations affect your verdict in any way? Each juror emphatically answered no. 3) Did Juror No. 9's dismissal affect your verdict in any way? Each juror again answered no without hesitation. (T 3971-78) The jury was then dismissed.

Dated: Brooklyn, New York
May 27, 1989

/s/_____
UNITED STATES DISTRICT COURT

Appendix D
Pertinent Constitutional and Statutory Provisions and Rules

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall ... be deprived of ... liberty ... without due process of law ...

F. R. Crim. Pro. 23(b) provides, in pertinent part:

> [I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

F. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

18 U.S.C. §2518(10)(a) provides, in pertinent part:

> Any aggrieved person in any trial ... may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that ... (iii) the interception was not made in conformity with the order of authorization or approval ...

18 U.S.C. §2510(11) provides:

> "aggrieved person" means a person who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed.